2006 WL 5110780 (N.Y.Sup.) (Trial Order)
Supreme Court, New York.
New York County

ESTEE LAUDER INC., Plaintiff,
v.
ONEBEACON INSURANCE GROUP, LLC (successor in interest to CGU Insurance, f/k/a Employers Group of Insurance Companies, Employers Commercial Union Insurance Co. of America and Commercial Union Insurance Company), OneBeacon Insurance Company and OneBeacon America Insurance Company, Defendants.

No. 602379/05.
December 11, 2006.

Decision/Order

Hon. Carol Robinson Edmead, J.S.C.

MEMORANDUM DECISION

This action was brought by plaintiff Estee Lauder Inc. (Estee Lauder) to compel defendants OneBeacon Insurance Group, LLC, OneBeacon Insurance Company and OneBeacon America Insurance Company (together, OneBeacon[1]) to pay defense costs and indemnify it for underlying claims brought against Estee Lauder arising from the alleged dumping of hazardous wastes in two landfills on Long Island. One of the claims is brought by the State of New York concerning the dumping of hazardous wastes at a landfill in Blydenburgh (the Blydenburgh Landfill), and the other concerns a landfill in Huntington (the Huntington Landfill) (together, the Environmental Claims). A third claim arises in the context of a third-party action against Estee Lauder in a matter entitled *State of New York v Hickey's Carting, Inc.,* Case No. CV 01-3136 (ED NY) (*Hickey's Carting*), which involves the Blydenburgh Landfill.

[1] All of OneBeacon's predecessors will also be referred to as "OneBeacon."

Presently before the Court are (1) Estee Lauder's motion for partial summary judgment on its third and fourth causes of action, alleging breach of contract and declaratory judgment regarding *Hickey's Carting* (mot. seq. no. 003); (2) OneBeacon's motion for summary judgment dismissing the amended complaint in its entirety, due to Estee Lauder's alleged failure to provide prompt notice of the Environmental Claims (mot. seq. no. 004); and (3) Estee Lauder's cross-motion to dismiss OneBeacon's defense of untimely notice.

I. Background

A. Underlying Claims against Estee Lauder

1. Environmental Claims Against Estee Lauder

(a) Blydenburgh

In a letter dated March 19, 1998, the State of New York wrote to Estee Lauder "Re: *Investigation of the Blydenburgh Landfill,*"[2] to inform Estee Lauder that the State was investigating "potentially responsible parties" (PRP) who might be found to be liable to the State for the remediation of hazardous wastes at the Blydenburgh Landfill (the March 1998 Letter). The March 1998 Letter informed Estee Lauder that a State investigation had uncovered that "you or entities with which you are or were associated, may be responsible for the disposal of [hazardous] wastes at the Landfill and/or for the generation of hazardous substances within the Town of Islip which substances may have been disposed at the Landfill."

2 John W. Shryber Aff., Ex. 3.

In the March 1998 Letter, the State enclosed a "Request for Information Pursuant to Environmental Conservation Law Article 27, Title 13," and a "Tolling Agreement" (the 1998 Blydenburgh Tolling Agreement), whereby Estee Lauder would "obtain a binding commitment from the State that it will not commence legal action against Estee Lauder, Inc. to recover costs related to the Landfill through March 18, 1999," during which time the State would continue its investigation in order to determine whether Estee Lauder bore any responsibility for the contamination of the site. Estee Lauder executed and returned the 1998 Blydenburgh Tolling Agreement.

In the 1998 Blydenburgh Tolling Agreement, the State of New York informed Estee Lauder that it "may be liable to [the State] for costs incurred by the State and/or damages relating to the disposal of hazardous substances at the [Blydenburgh] Site pursuant to CERCLA [Comprehensive Environmental Response, Compensation and Liability Act] and state common law," and agreed that, in the interests of commencing settlement negotiations "which may resolve the foregoing controversy," the State would "forego the filing and commencement of an action under CERCLA and/or applicable State law ... at this time."[3] Neither the letter nor the Tolling Agreement specifically identify Estee Lauder as a PRP.

3 Shryber Reply Aff., Ex. 1.

Thereafter, in a letter dated March 18, 1999, the State of New York specifically identified Estee Lauder as a PRP with regard to the Blydenburgh Landfill.[4] The State suggested the formation of a "PRP group" of companies on the PRP list, which included Estee Lauder. In addition, since "the tolling agreement entered into by the PRPs... has (or is about to) come to an end," the State requested that the PRPs execute another tolling agreement "to extend the tolling period by one year for the State to commence an action."[5] By letter dated May 14, 1999, the State of New York requested that a meeting be held to facilitate the formation of a PRP Group "to help resolve the State's claims without having to resort to litigation."[6] The May 1999 letter also advised that the State had "obtained executed revised tolling agreements from all of the PRPs contacted by [the State] on March 18, 1999," including Estee Lauder, except for National Services Industries, Inc. ("NSI").[7]

4 George H. Martini Aff., Ex. 1.

5 *Id.*

6 Martini Aff., Ex.1.

7 Martini Aff., Ex. 2.

(b) Huntington

Estee Lauder has also been implicated in the dumping of hazardous wastes at the Huntington Landfill; however, a copy of any letter comparable to the Blydenburgh March 1998 Letter does not appear in the record. Instead, Estee Lauder signed a tolling agreement, concerning the Huntington Landfill, dated June 11, 1998 (the 1998 Huntington Tolling Agreement).[8] The 1998 Tolling Agreement amended a 1997 tolling agreement between the State and Estee Lauder, which recited that the State "intends to file an action, against certain persons or private entities alleging that they are liable, pursuant to [CERCLA],... to reimburse the State for costs... incurred in connection with response actions taken at the Huntington/East Northport Landfill ... and to recover damages for injury to, destruction of, or loss of natural resources ...." (the 1997 Huntington Tolling Agreement).

[8] Reply Aff. of Kotula, Ex. S.

The 1998 Huntington Tolling Agreement refers to Estee Lauder as a "Potential Defendant," and states that, as a "Potential Defendant," the State "has causes of action" against Estee Lauder under CERCLA." The Huntington Tolling Agreement also suggests that the State and Estee Lauder, as a Potential Defendant, enter the agreement "in order to pursue good faith efforts to settle."

In a letter dated May 5, 1999, the State of New York sent the listed PRPs, including Estee Lauder, a letter concerning the Huntington Landfill. This letter advised the PRPs of the State's consideration of forming a PRP group, and requested that Estee Lauder execute "the amended, attached Tolling Agreement which extends the tolling period so that we can avoid litigation at this time."[9]

[9] Martini Aff., Ex. 3.

(2) The *Hickey's Carting* Claim Against Estee Lauder

In 2001, the State of New York filed the *Hickey's Carting* complaint against Hickey's Carting, Inc. (Hickey's Carting) in the Eastern District of New York, claiming that Hickey's Carting violated CERCLA by causing the dumping of hazardous wastes in the Blydenburgh Landfill. Hickey's Carting, in turn, filed a third-party complaint against Estee Lauder, in 2002, alleging that Estee Lauder, and others, were liable, in whole or in part, for the costs of remediation of the conditions at the Blydenburgh Landfill.

B. Existence of Policy

Estee Lauder claims that it was insured under a comprehensive general liability policy, designated E16-40036-27, and effective from, as relevant here, 1968 through 1971 (the policy). The policy was allegedly issued by Employer's Liability Assurance Corporation, Ltd., a company associated with Employers' Group of Insurance Companies, a predecessor of OneBeacon. Both sides admit that there is no copy of the policy for the years 1968 through 1971.

Yet, Estee Lauder adamantly insists that there was a policy, and that fact can be proven through documentary evidence. There are three pieces of evidence with which Estee Lauder seeks to prove the existence of the policy: two certificates of insurance for the applicable time frame, and an alleged renewal policy, which commences the day after the allegedly missing policy would have terminated in 1971. Estee Lauder argues that the renewal policy, especially, proves that there was a policy covering the period 1968 to 1971. The policy, according to Estee Lauder, included coverage for any and all claims for property damage leveled against Estee Lauder, and thus Estee Lauder is entitled to a declaration that Estee Lauder is entitled to recover from OneBeacon all reasonable defense costs incurred in defending the *Hickey's* lawsuit.

OneBeacon objects to making any payments for Estee Lauder's defense costs in relation to *Hickey's Carting,* arguing that no policy existed for the years in question. It is OneBeacon's position that the reason no policy can be found is that no such policy was ever issued. Additionally, OneBeacon maintains that the secondary evidence presented by Estee Lauder is insufficient and unreliable to determine the terms and conditions of the purported policy. Further, summary judgment in favor of Estee Lauder is unwarranted, in light of issues of fact as to, *inter alia,* whether the purported policy afforded coverage for liabilities arising out of Estee Lauder's operations on Fifth Avenue or out of all of Estee Lauder's operations, including the Long Island facilities at issue, or whether the purported policy was subject to a pollution exclusion.

In reply, Estee Lauder argues that OneBeacon failed to come forward with any evidence to rebut the presumption that an issued-but-missing policy was issued in a form substantively identical to the Renewal policy. Nor can OneBeacon now assert that the policy did issue, and attest to some variation of terms to which it and Estee Lauder agreed in order to overcome the presumption that the terms of the renewal policy reflect the actual terms of the original policy.

C. Estee Lauder's Notice to OneBeacon

With regard to the Blydenburgh Landfill, is undisputed that the first notice from Estee Lauder to OneBeacon (and numerous other insurers), informing these entities that Estee Lauder "may at some point be named as a Potentially Responsible Party (PRP)" was sent in a letter dated May 20, 1999.[10] In this letter, Estee Lauder stated that "[i]n order to comply with the notice of occurrence provisions in the policies we are at this time reporting this matter on behalf of our client and are making a formal demand for defense and indemnification under any and all applicable policies of insurance." Attached to Estee Lauder's letter was a list of Policy numbers, which this Court notes did *not* include the policy at issue.

[10] Kotula Aff., Ex. U. After Estee Lauder received the March 1999 letter from the State, it informed its shareholders, and others, in several documents, that it had been named as a PRP in March 1998. OneBeacon points to these statements as admissions on Estee Lauder's part that it was, indeed, a PRP as early as March 1998. However, Estee Lauder maintains that the dates set forth therein were errors, and that it will correct the errors on its next shareholder's report. Since the issue here is when claims requiring notification to OneBeacon actually arose, and not when Estee Lauder told its shareholders that such claims arose, the court declines to accept these documents as proof of the institution of claims. *See* Kotula Aff., Exs. H-P.

In response by letter dated November 11, 1999, OneBeacon acknowledged Estee Lauder's letter regarding the Blydenburgh Landfill claim, advised Estee Lauder as to the status of OneBeacon's efforts to identify any relevant insurance policies, set forth a reservation of rights, and requested further information from Estee Lauder.[11]

[11] Kotula Aff., Ex. BB.

In a subsequent letter dated July 6, 2000, OneBeacon disclaimed coverage under certain policies, reserved its rights to assert any and all defenses of non-coverage under policies still under investigation, and requested, *inter alia,* that Estee Lauder identify each insurance company that issued policies from 1967 through 1971. Estee Lauder provided copies of a certificate of insurance and forms for the subject policy. OneBeacon responded, in a letter dated September 7, 2000, by disclaiming coverage under the policies previously under investigation, and that it "reserves all of its rights" with respect to the policy at issue, "while [OneBeacon] commences its own search for that policy." OneBeacon further stated that it "reserves the right to assert any and all defenses on non-coverage under Policy No. [sic] No. E16-40036-27 .... For one or more of the reasons referenced in our prior reservation of rights letters dated November 11, 1999 and July 6, 2000, Estee Lauder may not be entitled to coverage for the above-captioned [Blydenburgh] action under Policy No. E16-40036-27."

Finally, on July 24, 2002 (the July 2002 letter), OneBeacon advised Estee Lauder that based on the alleged lack of any evidence of the existence of the policy, OneBeacon "terminat[ed] its investigation of this matter and clos[ed] its files."[12] OneBeacon further advised that it "... continues to reserve any and all rights and defenses under any actual or alleged" policy and did not waive any possible coverage defenses.

[12] Kotula Aff., Ex. EE.

As to the Huntington Landfill, Estee Lauder sent a letter also dated May 20, 1999, stating that the Huntington Landfill "was previously reported to you on November 20, 1987 by Johnson & Higgins. We refer you to the attached correspondence dated November 13, 1987 from the Estee Lauder Companies, Inc."[13] The letter continues, "[o]ur client has been required to respond to allegations that The Estee Lauder Companies Inc. may be considered a Potentially Responsible Party (PRP). We hereby request a defense and indemnification under any and all applicable policies of insurance." Attached to this letter was a list of policies numbers, including the policy at issue.

[13] Kotula Aff., Ex. V. In 1987, Estee Lauder notified OneBeacon that the New York State Department of Environmental Conservation (DEC) had issued a report in 1986 concerning the Huntington Landfill, which made "reference to Estee Lauder Inc. and the items we allegedly disposed at the landfill." However, Estee Lauder states in the letter that it had not been contacted by the DEC. Kotula Aff., Ex. Y.

OneBeacon responded to Estee Lauder's notice of claim concerning the Huntington Landfill in a letter dated November 11, 1999. In this letter, OneBeacon acknowledged receipt of Estee Lauder's notice, advised as to the status of OneBeacon's efforts to identify any relevant insurance policies, set forth a reservation of rights under the "verified and alleged" policies to assert a claim that "To the extent that [OneBeacon] was not provided with notice of this claim in a timely manner, there may be no coverage." OneBeacon also requested further information from Estee Lauder and reserved "all rights and defenses under the terms, conditions ... of the verified and alleged" policies.[14]

[14] Kotula Aff., Exs. HH and II.

On September 7, 2000 and October 16, 2000, after having received from Estee Lauder copies of a certificate of insurance and policy forms for the subject policy, OneBeacon "reserve[d] all of its rights with respect" to the subject policy, "while [OneBeacon] commences its own search for that policy." The July 2002 letter, in which OneBeacon advised Estee Lauder that it "terminat[ed] its investigation of this matter and clos[ed] its files" included the Blydenburgh Landfill claim.[15]

[15] Kotula Aff., Ex. EE.

As for *Hickey's Carting,* Estee Lauder gave notice of this matter to OneBeacon within a week of receipt of the third-party complaint, by letter dated October 23, 2002. OneBeacon responded on October 30, 2002, to inform Estee Lauder that it had received the third-party complaint, and that, while reviewing it, OneBeacon "reserves all of its rights under the terms, conditions, exclusions and endorsements of any actual or alleged policy issued to Estee Lauder. Nothing herein should be considered a waiver of any rights under the alleged or actual policy."[16] By letter dated November 1, 2002, (the November 2002 letter) OneBeacon wrote, with regard to the third-party complaint in *Hickey's Carting,* that it "stands by its prior disclaimers of coverage with regard to the pre-1971 policies" and that, in the absence of proof of the policy, that, by its July 24, 2002 letter, it had closed its file on the matter, unless more information on the policy was received. OneBeacon again wrote that it was reserving its rights, and would not waive any possible defenses.

[16] Kotula Aff., Ex. FF.

OneBeacon maintains that Estee Lauder was late in giving OneBeacon notice of the Environmental Claims, and as a result, Estee Lauder is not entitled to recover defense costs or indemnification for any claim arising from the Environmental Claims, including the Environmental Claim at issue in *Hickey's Carting.*[17] Based on the above, OneBeacon argues that the 1998 Tolling Agreements, rather than the 1999 Tolling Agreements, were Estee Lauder's first notice of the Environmental Claims.

According to OneBeacon, Estee Lauder made numerous admissions in its Annual Reports to Shareholders and Annual 10-K Reports that it was notified of the State's Blydenburgh and Huntington claims in 1998. OneBeacon also points out that Estee Lauder's May 1999 letters failed to disclose the fact that Estee Lauder had already received notice from the State identifying Estee as a PRP at both sites in 1998. Further, the May 1999 letters failed to reference the 1998 Blydenburgh Tolling Agreement, or the 1997 and 1998 Huntington Tolling Agreements.

[17] OneBeacon also argues that Estee Lauder would be entitled to only a small percentage of its defense costs, and that issues of fact exist as to how large of a *pro rata* share Estee Lauder must pay of its own defense costs.

OneBeacon maintains that Estee Lauder did not give OneBeacon notice of the Blydenburgh Environmental Claim until over one year had passed. As to the Huntington Landfill, OneBeacon contends that Estee Lauder had provided notice to OneBeacon of a potential claim in April 1989; however, Estee Lauder indicated that it had not, "as of the present date, been contacted by the Department of Environmental Conservation nor has any claim or demand been made against us." OneBeacon requested further information concerning the potential claim. However, when a claim was made against Estee Lauder by the State that Estee was a PRP at the Huntington Landfill, Estee Lauder failed to timely notify OneBeacon, in that notice to OneBeacon of the Huntington Landfill claim was made over 11 months after Estee Lauder knew of possible claims based on that site. OneBeacon further contends that by letter dated November 11, 1999, OneBeacon advised Estee Lauder as to the status of its efforts to identify any relevant insurance policies, set forth a reservation of rights, and requested farther information from Estee Lauder.[18] In subsequent letters, OneBeacon continued to reserve its rights to assert defenses to the Huntington Landfill claim, and finally advised Estee Lauder that based on the alleged lack of any evidence of the existence of the policy, OneBeacon "terminat[ed] its investigation of this matter and clos[ed] its files."[19]

[18] Kotula Aff., Ex. BB.

[19] Kotula Aff., Ex. EE.

Further, OneBeacon asserts that Estee Lauder cannot defeat the late notice defense by arguing that it provided timely notice of the *Hickey's Carting* matter to OneBeacon, when it provided late notice of the alleged occurrence and claim concerning the Blydenburgh Landfill site. OneBeacon argues that Estee Lauder admitted the interrelationship of the *Hickey's Carting* matter and the State's claim that Estee Lauder is a PRP at the Blydenburgh Landfill. As a result, OneBeacon argues that Estee Lauder's claims are untimely made as a matter of law, freeing OneBeacon from any obligation to defend or indemnify Estee Lauder.

In response, Estee Lauder argues that the reference to Estee Lauder's status as a PRP in its Reports was an error, and that the documentary evidence indicates that Estee Lauder's first notice from the State was in 1999, and not 1998 as the Reports state. Further, as OneBeacon's letters of July 2002 and November 2002 constitute disclaimers of coverage, and OneBeacon failed to assert "untimely notice" as a ground for its disclaimers of coverage in these letters, OneBeacon waived its "untimely notice" defense. Where the disclaimer letter fails to specify the defense as a current and subsisting basis for disclaiming coverage, the "future" defense on that ground is waived as a matter of law, so long as the insurer had actual or constructive knowledge of facts making the defense evident at the time of the first disclaimer. According to Estee Lauder, OneBeacon was aware that Estee Lauder entered into the Blydenburgh and Huntington Tolling Agreements for more than two years before it first disclaimed coverage in 2002, yet OneBeacon never specified "untimely notice" as a current and subsisting ground for disclaiming coverage under the policy. Here, OneBeacon's July 6, 2000 letter indicates that OneBeacon had been provided with the 1998 Blydenburgh Tolling Agreement. Likewise, in 2000, Estee Lauder provided information to OneBeacon regarding the 1999 Huntington Tolling Agreement. Moreover, for purposes of constructive waiver, both "untimely notice" of a "claim" as well as of the "occurrence" must be specifically asserted if both are allegedly applicable. And, a "reservation of rights" to assert, in the future, unspecified defenses, is not the equivalent of actually disclaiming coverage on that ground. Further, OneBeacon's letter dated July 26, 1989 refers to Estee Lauder's awareness in November 1987 of the potential claim concerning the Huntington Landfill. And, OneBeacon's failure to affirmatively assert that any claim or occurrence notice

requirements have not been met constitutes a constructive waiver of such defense.

Estee Lauder further argues that it gave timely notice of the "Blydenburgh/Hickey's" claim in that the Blydenburgh Tolling Agreement was attached to a letter in which the State merely indicated that it was conducting an investigation to determine the PRPs and did not indicate that the State's investigation extended to events occurring prior to the September 1971 expiration date of the policy. Further, Estee Lauder had reasonable grounds for believing in its nonliability; given that the State's investigator notified Estee Lauder in May 1998 of its "no PRP" conclusion, the 1998 status of the State's investigation did not provide grounds for divining a potential claim within the policy period. Since it was not until May 1999 that the State responded to Estee Lauder's request for the basis of naming Estee Lauder a PRP in March 1999, Estee Lauder's notice to OneBeacon of the Blydenburgh claim on May 16, 1999 was timely.

Estee Lauder also argues that its notice to OneBeacon concerning the Huntington Landfill claim was timely, in that Estee Lauder first dispatched its notice to OneBeacon of a potential claim arising from this landfill on November 20, 1987.

OneBeacon retorts that Estee Lauder's claim that the reference in its Reports to "1998" was inadvertent is unsupported by any documentary evidence. Further, Estee Lauder's claim that it had no basis to consider the State's claims as involving the policy lacks merit, in that Estee Lauder was aware of the State's claims regarding both sites by 1998. Further, OneBeacon denies any waiver of the late notice defense, arguing that from the earliest dates, it reserved all of its rights to disclaim coverage, and that waiver was not possible since Estee Lauder did not fully share what it knew about the State's claims against it with OneBeacon. OneBeacon denies that the July 2002 and November 2002 letters are "disclaimers," but instead, were simply advising that it was unable to locate the policy. And, according to OneBeacon, its Answer sufficiently alleged a number of defenses that specifically placed Estee Lauder's non-compliance with the notice requirements

II. Discussion

A. Summary Judgment

It is well settled that the proponent of a motion for summary judgment, must establish that the "cause of action ... has no merit" (CPLR § 3212 [b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.,* 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.,* 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder,* 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg,* 300 AD2d 10, 11, 751 NYS2d 433,434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 (b)). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra; Prudential Securities Inc. v Rovello,* 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR § 3212 (b)). Thus, where the proponent of the motion makes *a prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.,* 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra,* 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind,* 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.,* 93 AD2d 772 [1st Dept 1983], *affd,* 62 NY2d 686 [1984]).

In the first cause of action, Estee Lauder brings a claim for breach of contract against OneBeacon for its failure to honor the

policy with regard the Huntington Landfill. A claim for breach of contract is also brought with regard to the Blydenburgh Landfill, in the second cause of action. In the third cause of action, Estee Lauder brings a claim for breach of contract as to the *Hickey's Carting* action, and seeks, in the fourth cause of action, a declaratory judgment that OneBeacon must repay Estee Lauder for all reasonable fees and expenses incurred in defending *Hickey's Carting,* and indemnify it for any reasonable settlement of any claim brought against it based on either the Blydenburgh Landfill or *Hickey's Carting.*

B. Prematurity

OneBeacon strenuously opposes Estee Lauder's motion on the ground that important discovery has yet to take place, especially as to the missing policy issue.

Under CPLR 3212 (f), a party may defend itself from a motion for summary judgment by showing the court that "facts essential to justify opposition may exist but cannot then be stated" (*see Artigas v Renewal Arts Realty Corp.,* 22 AD3d 327 [1st Dept 2005]). However, although Estee Lauder has yet to comply with OneBeacon's notice for depositions, and has allegedly failed to produce many documents, or has shielded those documents behind claims of privilege, OneBeacon has not shown that the lack of essential facts effectively bars OneBeacon's response to Estee Lauder's motions, or the making of its own.

OneBeacon maintains that discovery might reveal that Estee Lauder had notice of the Environmental Claims much earlier than Estee Lauder will admit, and that, as a result, it delayed even longer in giving OneBeacon notice. However, even if this is true, OneBeacon has not shown that this information would aid it in its defense of Estee Lauder's motion, which is directed solely at the issue of the existence of the policy. It is OneBeacon's own motion which raises late notice. OneBeacon was not required to make its motion at this time. Therefore, OneBeacon has not established that facts exist essential to its defense of Estee Lauder's motion, to which it has not had access.

C. Notice

1. Estee Lauder's Notice Obligation

Notice is a threshold question in this case. Even assuming that there is a policy, if OneBeacon did not receive timely notice of the Environmental Claims, whether the policy actually existed is an issue that need not be reached.

While no copy of the disputed policy exists, Estee Lauder alleges that the policy and the renewal policy were identical, except for the coverage dates. OneBeacon, through its expert, Arthur T. Simmonds, agrees that the policy's language would have tracked that of the alleged renewal policy, to read that all notices of an occurrence be made "as soon as practicable," and that notice of any "claim or suit" be sent "immediately."[20]

[20] Simmonds Aff., at 8.

Where a policy of insurance requires that the insured give the insurer notice "as soon as practicable," notice must be afforded within a "reasonable time under the circumstances" (*Travelers Insurance Co. v Volmar Constr. Co.,* 300 AD2d 40, 42 [1st Dept 2002]). The notice requirement is a condition precedent to coverage and so, failure to provide such notice vitiates the contract of insurance (*Great Canal Realty Corp. v Seneca Ins. Co.,* 5 NY3d 742 [2005]; *Ocean Partners, LLC v North River Insurance Co.,* 25 AD3d 514, 515 [1st Dept 2006] ["[p]laintiff's failure to provide notice of its claim until 28 months after the fire constituted an unreasonable delay and a failure to satisfy a condition precedent to coverage under the policy"]). There is no need to show that the insurer suffered any prejudice as a result of tardy notice (*Id.; see also Argo Corp. v Greater New York Mutual Insurance Co.,* 4 NY3d 332 [2005]; *Security Mutual Ins. Co. of New York v Acker-fitzsimons Corp.,* 31 NY2d 436 [1972]).

This Court finds that the two 1998 Tolling Agreements constituted sufficient notice to Estee Lauder that the State might bring

suit against it as to both the Environmental Claims, and potential lawsuits based on the Environmental Claims, sufficient to trigger Estee Lauder's obligation to notify OneBeacon under the terms of the putative policy.

With regard to the Blydenburgh site, the State expressly advised Estee Lauder in its March 1998 letter that:
The State is conducting an investigation to determine which parties are potentially responsible for the disposal of hazardous substances at the Landfill. Potentially responsible parties may be liable to the State for the costs incurred by the State in investigating and remediating conditions at the Landfill pursuant to [CERCLA].

In the course of our investigation, we have received information that indicates that you ... may be responsible for the disposal of wastes at the Landfill and/or for the generation of hazardous substances within the Town of Islip which substances may have been disposed at the Landfill.[21]

[21] Schryber Reply Aff., Ex. 3.

... During the tolling period [indicated in the Tolling Agreement, under which the State agrees to refrain from commencing "legal action against Estee Lauder, Inc. to recover costs"], the State will continue its investigation to determine whether Estee Lauder, Inc. is liable to the State for the costs of investigating and remediating conditions at the Landfill.

In so doing, the State, while not yet designating Estee Lauder as a PRP, set the stage for such designation, and surely made " 'an assertion by a third party that in the opinion of that party the insured may be liable to it for damages within the risks covered by the policy' " (*State of New York v Ludlow's Sanitary Landfill, Inc.,* 50 F Supp 2d 135, 138 [NDNY 1999], *quoting American Ins. Co. v Fairchild Indus.,* 56 F3d 435, 439 [2d Cir 1995]).

Furthermore, the 1998 Blydenburgh Tolling Agreement reiterates the State's position that Estee Lauder "may be liable to [the State] for costs incurred by the State and/or damages relating to the disposal of hazardous substances at the Site, pursuant to CERCLA and state common law ...."[22] In *State of New York v Ludlow's (supra),* Special Metals Corporation (SMC), a company operating a "metal alloy production plan" (50 F Supp 2d at 136), received a PRP letter from the State of New York, dated December 6, 1983, informing SMC that it might be responsible for dumping polychlorinated biphenyls (PCBs), which had been hauled by Ludlow's Sand & Gravel Company (Ludlow's), to a landfill operated by Ludlow's. Unlike the PRP letters in the present action, SMC's PRP letter specifically stated that it constituted a claim by the State for "costs, damages and claims recoverable ... under federal and state law, including CERCLA" (*Id.* at 136 n 1).

[22] Schryber Reply Aff. Ex. 1.

SMC then conducted an investigation. In April 1984, SMC was informed by its own investigator that "the environmental authorities attributed the PCBs at the site to SMC." *Id.* In August 1984, SMC entered into a consent degree in which, among other things, SMC agreed to investigate the site. As a result of its investigation, SMC learned in November 1984 that it was responsible for the PCBs. Its notice to its insurer was mailed on October 15, 1984.

The *Ludlow's* court, after a thorough review of the law, held that "a PRP letter should sufficiently constitute a claim thereby triggering the insured's duty to provide a notice of claim to the insurer" (*id,* at 139), and that the PRP letter SMC received in December 1983 was a notice of a claim made against SMC by the State which triggered SMC's obligation to notify its insurer.

The language contained in the Blydenburgh Tolling Agreement cannot be overlooked, merely because the State was still investigating the matter, and is sufficient to apprise Estee Lauder that a claim existed against it for purposes of the notice provision in the policy (*see State of New York v Ludlow's Sanitary Landfill, Inc.,* 50 F Supp 2d 135, *supra*).

The 1998 Huntington Tolling Agreement is even more explicit. This document designates Estee Lauder as a "Potential Defendant," and states that, as such, "[t]he State contends that it has causes of action against [Estee Lauder]" under CERCLA and state law.[23] Estee Lauder was thereby put on notice that a lawsuit by the State against Estee Lauder was a possibility, and thus, OneBeacon was entitled to notice of the claim against Estee Lauder (*see Long Island Lighting Co. v Allianz Underwriters Ins. Co.,* 24 AD3d 172 [1st Dept 2005][notice to insurer required when insured receives a letter threatening a lawsuit]).

23 Kotula Aff., Ex. S.

There is not a large window of opportunity for an insured to serve a notice of a claim upon its insurer, as relatively short periods of time have been found to be untimely as a matter of law (*see id.* [six months]; *Brownstone Partners/A F & F, LLC v A. Aleem Constr., Inc.,* 18 AD3d 204 [1st Dept 2005] [five months]; *Heydt Contracting Corp. v American Home Assurance Co.,* 146 AD2d 497 [1st Dept 1989][four months]). Estee Lauder's notice to OneBeacon of the two potential claims in May 1999, approximately one year after the 1998 Agreements were executed, is untimely under this standard.

Estee Lauder fares no better in the case of *Hickey's Carting,* as its failure to notify OneBeacon of the underlying Environmental Claims in 1998 forebodes defense of an action based on these claims. Notably, the March 1998 Letter indicating the State's consideration of a lawsuit against Estee Lauder warns that Estee Lauder "or entities with which you are or were associated, may be responsible for the disposal of wastes at The [Blydenburgh] Landfill." The threat of suit against Estee Lauder was premised on acts of Estee Lauder. *Hickey's Carting* allegedly arises out of Estee Lauder's acts undertaken at the Blydenburgh Landfill site. As a result of the foregoing, Estee Lauder's notice to OneBeacon of *Hickey's Carting* was also untimely as a matter of law.

Estee Lauder's further argument that it had no reason to know that the Tolling Agreements dealt with the period of the policy, 1969 to 1971, provides no basis to excuse its failure to notify OneBeacon in 1998. It has been held that "there may be circumstances that excuse a failure to give timely notice, such as where the insured has a good faith belief of nonliability, provided that belief is reasonable [internal quotation marks and citation omitted]." *Great Canal Realty Corp. v Seneca Insurance Company, Inc.,* 5 NY3d 742 (2005). However, relevant on the issue of reasonableness, is consideration of whether and to what extent, the insured has inquired into the circumstances of the accident or occurrence (*Id. citing White v City of New York,* 81 NY2d 955, 958 [1993] [stating that, "where a reasonable person could envision liability, that person has a duty to make some inquiry"]). Additionally, the insured bears the burden of establishing the reasonableness of the proffered excuse. In its Amended Complaint, Estee Lauder admits that it used the Huntington and Blydenburgh Landfills from at least 1968,[24] within the policy period. Estee Lauder admitted using the Huntington Landfill from at least 1967, in a letter to the DEC dated 1996.[25] Further, Estee Lauder's carting company, South Side Carting, affirms that it has been Estee Lauder's sole carting company since 1956 and performed waste disposal services at the Huntington Landfill (albeit, through incineration of solid wastes).[26] Thus, since Estee Lauder's waste has been sent to the Landfills during the policy period, it is unpersuasive to now assert that it could not have reasonably believed that the subject period might not be included in the Tolling Agreements, even if Estee Lauder claims that it did not dump any wastes of a hazardous nature in the Landfills at any time. This excuse does not vitiate Estee Lauder's late notice.

24 Amended Complaint, Schryber Aff., Ex. A., at ¶¶ 30, 38.

25 Kotula Aff., Ex. Q.

26 Kotula Aff., Ex. C.

2. OneBeacon's Waiver of the Late-Notice Defense

Contrary to Estee Lauder's contention, OneBeacon has not waived its right to assert untimely notice as an affirmative defense. An insurer must give written notice of disclaimer on the ground of late notice "as soon as is reasonably possible after it first learns of the accident or of grounds for disclaimer of liability" (*Hotel des Artistes v General Accident Ins. Co.,* 9 AD3d 181 [1 st Dept 2004]). A failure by the insurer to give such notice as soon as is reasonably possible after it first learns of the accident or of grounds for disclaimer of liability or denial of coverage, precludes effective disclaimer or denial, and amounts to a waiver of the right to assert a late-notice defense (*Hartford Ins. Co. v Nassau County,* 46 NY2d 1028, 416 NYS2d 539 [1979]). Waiver is "a voluntary and intentional relinquishment of a known right" (*Albert J. Schiff Assocs., Inc. v Flack,* 51 NY2d 692, 698 [1980]) and in the insurance context, waiver may be found "where there is direct or circumstantial proof that the insurer intended to abandon the defense" (*id.; see Central General Hosp. v. Chubb Group of Ins. Companies,* 90 NY2d 195, 659 NYS2d 246 [1997]). In this regard, a defense of late notice may be waived by failing to assert it in a letter of disclaimer where other defenses are asserted (*citing General Acc. Ins. Group v Cirucci,* 46 NY2d 862 [1979]; *Appell v Liberty Mut. Ins. Co.,* 22 AD2d 906, 255 NYS2d 545 [2d Dept 1964], *affd* 17 NY2d 519 [1966]; *Benjamin Shapiro Realty Co. v Agricultural Ins. Co.,* 287 AD2d 389, 731 NYS2d 453 [1st Dept 2001]). In *State of New York v AMRO Realty Corp.* (936 F2d 1420, 1431 [2d Cir 1991]), the Second Circuit recognized the rule under New York law that "an insurer is deemed, as a matter of law, to have intended to waive a late notice defense to coverage where other defenses are asserted, and where the insurer possesses sufficient knowledge (actual or constructive) of the circumstances regarding the unasserted defense" [stating that after receiving notice from the insured of a four-year old "occurrence," there was "no need for the [insurer] to wait until the filing of the complaint some sixteen months later, before making its decision whether to assert a late-notice-of-occurrence defense, the availability of which was obvious and blatant from the face of the notice"].

However, courts have expressly found an *exception* to waiver, in that where an insurer expressly reserves all its rights under the insurance contract to disclaim a claim, there is no waiver of any particular ground, merely because it was not made in an initial letter of disclaimer (*General Ins. Co. of America, Inc. v. Marvel Enters, Inc.,* 2 Misc 3d 1003, 784 NYS2d 920 [NY Sup 2004]; *National Restaurants Mgmt., Inc. v Executive Risk Indemnity, Inc.,* 304 AD2d 387 [1st Dept 2003]["Since defendant at all relevant times expressly reserved its right to disclaim, neither its initial disclaimer on a different ground from that ultimately invoked, nor its later qualified acknowledgment of coverage, entitles plaintiffs to recover the defense costs they incurred up until the time that defendant finally invoked the securities exclusion"]; *Raniolo v Travelers Indemnity Co.,* 279 AD2d 514 [2d Dept 2001]; *Compis Servs., Inc. v Hartford Steam Boiler Inspection and Insurance* Company, 272 AD2d 886 [4th Dept 2000]; *General Ins. Co. of America v Marvel Enters.,* 2 Misc 3d 1003 [Sup Ct NY County 2004]). This principle has been applicable where the insurer possesses sufficient knowledge of the circumstances regarding the unasserted defense at the time the initial disclaimer letter is provided (*see General Ins. Co. of America, Inc. v Marvel Enters., Inc., supra). In General Ins. Co. v Marvel Enterprises, Inc. (supra*), the Court found that the insurer appeared to have all of the information it needed to disclaim coverage on the ground of untimely notice when it disclaimed coverage for certain claims on other grounds. However, since the insurer's "reservation of rights was not limited" but "expressly reserved all of its rights under the contract," it did not waive its late notice defense, as a matter of law.

In this matter, the 1999 and 2000 letters OneBeacon sent to Estee Lauder regarding both Landfills contained an express reservation of all rights. Specifically, in its November 1999 letters to Estee Lauder regarding the Blydenburgh and Huntington Landfill claims, OneBeacon stated that OneBeacon "reserves the right to assert any and all defenses of non-coverage under the verified and alleged ....policies, including those defenses which may be developed or discovered during the course of further investigation. Specifically, Estee Lauder may not be entitled to coverage for the above-referenced claim ... for one or more of, but not limited to, the following reasons.... I. "To the extent that [OneBeacon] was not provided with notice of this claim in a timely manner, there may be no coverage." The September 7, 2000 and October 16, 2000 letters from OneBeacon advised that its investigation of the existence of the policy "is not meant to waive any rights of defenses [OneBeacon] may have under policy No. E16-40036-27...."

Thus, that OneBeacon possessed sufficient knowledge to assert a late-notice defense by virtue of its receipt of the Tolling Agreements executed by Estee Lauder in 1999 is inconsequential under the circumstances, in light of OneBeacon's reservation of any and all rights under the policy.

Estee Lauder's reliance on *Amro* for the proposition that OneBeacon waived its right to assert late notice as a defense, is misplaced. The reservation of rights found to be ineffective to maintain an apparently known, but unasserted defense in *Amro,* is distinguishable from the reservation of rights asserted by OneBeacon herein. The Court in *Amro* stated that a

disclaimer "on certain grounds but not others is deemed *conclusive* evidence of the insurer's intent to waive the unasserted grounds [emphasis in original]" (*Id.* at 1432). However, while the language in *Amro* is beguiling, the Court also concluded the decision by stating that "[w]e note that we do not address here the case where the insurer's disclaimer of coverage based on specified grounds is accompanied by an express and unequivocal statement that other grounds for disclaimer are reserved and not waived" (*Id.* at 1433). The *Amro* Court also noted that the reservation of the insurer's "rights to rely on additional reasons for disclaimer should they become apparent in the future" could not be read to obviate the insurer's waiver under the circumstances, as the late-notice defense did not "become apparent" after the State CERCLA complaint was filed, but rather was evident at the time Lumbermens issued its disclaimer letter." Thus, in *Amro,* there was a reservation of rights, but only as to reasons for disclaimer "should they become apparent in the future" and the *Amro* insurer could not reserve rights it knew of at the time of the first disclaimer.

Here, as stated above, there is an express and unequivocal reservation of *all* rights under the contract, as opposed to those apparent in the future in *Amro.*

Likewise, the other cases on which Estee Lauder relies in support of its waiver claim are distinguishable, in that they are silent as to whether the insurer asserted a reservation of *any or all* rights under the contract (*Burt Rigid Box, Inc. v Travelers Property Casualty Corp.,* 302 F3d 83 [2d Cir. 2002] *and Shapiro v Agricultural Ins. Co.,* 287 AD2d 389 [1st Dept 2001]), and the reservation of rights was limited and thus ineffective for the insurer to preserve a late notice defense (*see TIG Inc. Co. v Town of Cheektowaga,* 142 FSupp2d 343 [2000] [stating that although insurer reserved right to disclaim on the ground that the claims were outside the scope of policy, insurer failed to specify that it reserved the right to disclaim based on late notice, and thus insurer waived its late notice ground by failing to reserve or timely assert it] and *Amro, supra*).

Nor does the *Hotel des Artistes v General Accident Ins. Co.,* 9 AD3d 181 [1st Dept 2004], decided by the First Department one month after *General Ins. Co. of America v Marvel Enters.,* 9 AD3d 181 [1st Dept 2004]), warrant a finding of waiver. In *Hotel des Artistes,* the plaintiff's insured building suffered damage from a fire in its tenant's ground-floor restaurant. The plaintiff and tenant contractually agreed to the necessary repairs. The tenant thereafter commenced a suit against plaintiff to recover the costs for the repairs, alleging, *inter alia,* breach of duty under the lease to make repairs. After the plaintiff submitted the pleadings to the insurer seeking defense of action, the insurer issued a disclaimer letter denying coverage on the ground that the policy did not cover a "breach of contract claim," and that there was no damage alleged against the insured that would qualify under the definition of 'bodily injury' or 'property damage' which are the only damages the policy covered. The Court noted that the insurer did not cite any specific exclusion, but did state that it was not waiving any rights or defenses under the policy not mentioned in the disclaimer letter. In a declaratory judgment action later brought against the insurer, the insurer cross moved for summary judgment, arguing that the underlying claim was outside the scope of the policy since the policy did not cover contract-based losses, and in the alternative, argued that the insured failed to provide notice of the occurrence "as soon as practicable" as required under the policy. The Court noted that the insurer did not disclaim on the basis of late notice, nor raised the late-notice issue in its Answer. On the premise that an insurer "must give notice of disclaimer on the ground of late notice 'as soon as is reasonably possible after it first learns of the ... grounds for disclaimer of liability,' the Court held that the insurer's failure to do so in its disclaimer letter and in its answer (CPLR 3211[e]) constituted a waiver of this defense (*see* 151 East 26th *Street Assocs. v QBE Ins. Co.,* 33 AD3d 452 [2006] [holding that where the insurer never issued a written disclaimer of coverage citing the failure of the insured to give "prompt" notice pursuant to the policy, and did not raise the lack-of-prompt-notice defense until more than three years after the receiving plaintiff's notice of claim, the insurer waived the defense]).

Here, it cannot be said that OneBeacon did not "raise" the late-notice defense for the first time in connection with motions for summary relief. Contrary to Estee Lauder's contention, and unlike the insurer in *Hotel des Artistes, (supra*), OneBeacon "raised" the late-notice defense, to the extent the policy existed, in its Amended Answer to First Amended Complaint. In its Fourth Affirmative Defense, OneBeacon alleges that Estee Lauder failed to "perform or comply with any of the obligations or conditions that may be contained in the alleged insurance policy allegedly issued ... including, but not limited to, the notice and cooperation requirements." Nor does the *Hotel des Artistes'* case in which it was held that failure to raise the late-notice issue in a disclaimer and as a defense in the answer constituted a waiver, address whether the tenth affirmative defense herein sufficiently preserves the late-notice defense.

Having failed to demonstrate that OneBeacon waived its right to assert a late-notice defense to this action, Estee Lauder cannot overcome the showing that its notice to OneBeacon of the underlying claim was untimely. As a result, OneBeacon's

late notice of claim defense holds, and Estee Lauder's action is dismissed.

III. Conclusion

Accordingly, it is

ORDERED that Estee Lauder's motion for partial summary judgment on its third and fourth causes of action (mot. seq. no. 003) is denied; and it is further

ORDERED that OneBeacon's motion for summary judgment dismissing the complaint (mot. seq. no. 004) is granted, and the complaint is dismissed with costs and disbursements to OneBeacon as taxed by the Clerk of the Court; and it is further

ORDERED that Estee Lauder's cross-motion to dismiss OneBeacon's defense of untimely notice is denied; and it is further

ORDERED that OneBeacon shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

December 11, 2006

<<signature>>

Hon. Carol Robinson Edmead, J.S.C.

62 A.D.3d 33, 873 N.Y.S.2d 592, 2009 N.Y. Slip Op. 01313

**1 Estee Lauder Inc., Appellant
v
OneBeacon Insurance Group, LLC, et al., Respondents.

Supreme Court, Appellate Division, First Department, New York
February 19, 2009

CITE TITLE AS: Estee Lauder Inc. v OneBeacon Ins. Group, LLC

SUMMARY

Appeal from an order of the Supreme Court, New York County (Carol R. Edmead, J.), entered December 12, 2006. The order granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's motion for summary judgment on its third and fourth causes of action and its cross motion to dismiss defendants' defense of untimely notice.

HEADNOTE

Insurance
Disclaimer of Coverage

Waiver of Right to Disclaim Coverage on Ground of Untimely Notice

By rejecting plaintiff insured's claim for defense and indemnity with respect to certain environmental claims in a letter stating that it was "terminating its investigation of this matter and closing its file" because it could not "locate any further evidence" of the policy under which plaintiff sought coverage, defendant insurer waived its right to subsequently disclaim coverage on the ground that plaintiff failed to give it timely notice of the claims. Defendant had sufficient knowledge to assert a late notice defense prior to sending the letter. Defendant's sweeping reservation of all of its rights in the letter did not prevent a waiver of the right to assert a defense of late notice. An insurer may not, merely by reserving the right to do so, disclaim coverage on one ground and thereafter disclaim coverage on another ground where, as here, it had actual or constructive knowledge of the latter ground at the time of the initial disclaimer. Even though defendant's letter did not specifically state that it was "disclaiming" coverage, the letter made clear that it was in fact denying coverage. Furthermore, defendant's assertion that there was no policy did not absolve it of its duty to make timely, specific and nonselective disclaimers. Plaintiff otherwise demonstrated its entitlement to a defense by producing sufficient secondary evidence of the disputed policy, including a renewal policy issued by defendant's predecessor.

RESEARCH REFERENCES

Am Jur 2d, Insurance §§ 1399–1401, 1413.

Couch on Insurance (3d ed) §§ 195:55, 198:53, 198:55.

NY Jur 2d, Insurance §§ 1923, 1926, 1928, 1929, 1947.

ANNOTATION REFERENCE

See ALR Index under Insurance and Insurance Companies.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

*34 Query: notice /3 disclaimer /s insurer /p waive

APPEARANCES OF COUNSEL

Patton Boggs LLP, Washington, D.C. (*John W. Schryber* of counsel); *Patton Boggs LLP*, New York City (*Shannon W. Conway* of counsel), and *Morrison Cohen LLP*, New York City (*Mary E. Flynn* and *Alvin C. Lin* of counsel), for appellant.
Rivkin Radler LLP, Uniondale (*Michael A. Kotula, Gary D. Centola* and *Janice M. Greenberg* of counsel), for respondents.

OPINION OF THE COURT

McGuire, J.

This breach of contract and declaratory judgment action commenced by plaintiff Estee Lauder Inc. against its insurer, defendant OneBeacon Insurance Group, LLC and its affiliates, arises from OneBeacon's refusal to defend and indemnify certain environmental claims asserted against plaintiff. The resolution of this appeal turns on whether OneBeacon waived its right to disclaim coverage on the ground that plaintiff failed to give it timely notice of certain claims against plaintiff. ****2**

By a letter to counsel for Lauder dated July 24, 2002, OneBeacon rejected Lauder's claim for defense and indemnity with respect to claims against Lauder relating to the Huntington and Blydenburgh landfills. Specifically, OneBeacon advised that it was "terminating its investigation of this matter and closing its file." The sole ground stated for this decision was that OneBeacon "cannot locate any further evidence" of the policy under which Lauder sought coverage, a policy that Lauder could not locate, although it identified the policy, which assertedly ran from September 1968 to September 1971, by its policy number. Thereafter, by a letter dated November 1, 2002, OneBeacon denied Lauder a defense to another action, the Hickey's Carting claim, relating to the Blydenburgh landfill. The stated ground for this decision was the same ground stated in the July 24 letter, i.e., that "OneBeacon has been unable to find any other evidence to confirm the existence and terms of th[e] . . . policy" that Lauder contended OneBeacon's predecessor had issued. Referencing its July 24 letter and other correspondence, OneBeacon stated that it "stands by its prior disclaimers of coverage." Neither in the July 24 nor the November 1 letter did OneBeacon ever assert that Lauder had failed to give timely notice of a claim or occurrence, let alone disclaim coverage on the ground of such a failure by Lauder.

***35** An insurer's "notice of disclaimer must promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated" (*General Acc. Ins. Group v Cirucci*, 46 NY2d 862, 864 [1979]). Of course, an insurer may reserve the right to disclaim on such different or alternative grounds as it may later find to be applicable (*National Rests. Mgt. v Executive Risk Indem.*, 304 AD2d 387, 388 [2003]). However, "[a]n insurer must give written notice of disclaimer on the ground of late notice as soon as is reasonably possible after it learns of the accident or of grounds for disclaimer of liability, and failure to do so precludes effective disclaimer" (*Matter of Firemen's Fund Ins. Co. of Newark v Hopkins*, 88 NY2d 836, 837 [1996] [internal quotation marks omitted]). Because of the insurer's duties to disclaim promptly and with specificity, "New York law establishes that an insurer is deemed, as a matter of law, to have intended to waive a defense to coverage where other defenses are asserted, and where the insurer possesses sufficient knowledge (actual or constructive) of the circumstances regarding the unasserted defense" (*State of New York v AMRO Realty Corp.*, 936 F2d 1420, 1431 [1991]).[1]

As the duties to disclaim promptly and specifically are imposed by law (*see Hotel des Artistes, Inc. v General Acc. Ins. Co. of Am.*, 9 AD3d 181, 193 [2004], *lv dismissed* 4 NY3d 739 [2004]), an insurer cannot unilaterally absolve itself of these duties. Thus, an insurer cannot avoid a waiver of a defense of which it has actual or constructive knowledge (i.e., avoid its duties to disclaim promptly and with specificity on the basis of that defense) by a unilateral assertion in a disclaimer notice that it is reserving or not waiving a right to disclaim on other, unstated grounds (*id.* at 185, 193 [despite statement by insurer in its disclaimer letter that it was not waiving any rights or defenses under the policy not mentioned in the letter, insurer waived defense of late notice both because it failed to disclaim on this ground in the letter and because it ****3** failed to raise a defense of late notice in its answer]; *see also Allstate Ins. Co. v Moon*, 89 AD2d 804, 806 [1982]).[2]

***36** On the basis of, among other things, a tolling agreement between Lauder and the Attorney General relating to the Blydenburgh landfill claim that Lauder produced to OneBeacon in April 2000 (familiarity with which OneBeacon acknowledged on July 6, 2000), a notice of potential claim relating to the Huntington landfill that Lauder provided to OneBeacon in 1987 and a notification made by Lauder to OneBeacon and other carriers in May 1999 that the Attorney General had identified it as a "potentially responsible party" in connection with the Huntington landfill, it is clear that long before its July 2002 and November 2002 letters OneBeacon had sufficient knowledge of the circumstances relating to its defense of untimely notice. Indeed, OneBeacon does not argue otherwise in its brief.

Nor did Supreme Court conclude otherwise. Rather, Supreme Court reasoned that in light of the sweeping reservation of all of its rights, "that OneBeacon possessed sufficient knowledge to assert a late-notice defense by virtue of its receipt of the [tolling agreement] . . . is inconsequential." Thus, an erroneous conclusion of law—namely, that as long as an insurer claims or reserves the right to do so, it may disclaim coverage on one ground and thereafter disclaim coverage on another ground even

though it had actual or constructive knowledge of the latter ground at the time of the initial disclaimer—was the basis for Supreme Court's conclusion that OneBeacon had not waived its right to assert a defense of late notice.[3]

OneBeacon is not persuasive in contending that it did not disclaim coverage in its July 2002 and November 2002 letters. As noted, in the July 2002 letter OneBeacon informed Lauder that it was "terminating its investigation of this matter and closing its file" with respect to Lauder's tender under the disputed pre-1971 policy (Policy No. E16-40036-27) with regard to the Huntington and Blydenburgh landfills. With respect to the Hickey's Carting claim, OneBeacon expressly referenced in ***37** its November 2002 letter the earlier decision to close its file and went on to state, "[p]lease be advised that OneBeacon has determined, at this time, it will ****4** not revisit its prior determination." Even assuming that OneBeacon did not state in either letter that it was "disclaiming" coverage, both letters made clear that OneBeacon was denying coverage.[4]

No case cited by OneBeacon supports the proposition that an insurer disclaims coverage only if it uses a form of the word "disclaim" in the course of denying coverage. The cases that are on point are to the contrary (*see e.g. Commercial Union Ins. Co. v International Flavors & Fragrances, Inc.*, 822 F2d 267, 270, 274 [2d Cir 1987] [construing New York law]). Moreover, to accept OneBeacon's position would exalt form over substance and invite gamesmanship. Because we conclude that OneBeacon did disclaim coverage in the July 2002 and November 2002 letters, we need not address Lauder's independent contentions that OneBeacon constructively waived its untimely notice defenses by failing to assert them within a reasonable time (*see e.g. 151 E. 26th St. Assoc. v QBE Ins. Co.*, 33 AD3d 452 [2006]) and by failing to assert them with specificity in its answer to Lauder's complaint (*see e.g. Hotel des Artistes*, 9 AD3d at 193).

With respect to constructive waiver, one final contention by OneBeacon should be addressed. It argues that "where, as here, the existence of coverage has not been established because the insurance policy is missing, . . . an insurer cannot waive its right to disclaim coverage." To be sure, as noted above, "where the issue is the existence or nonexistence of coverage (e.g., the ***38** insuring clause and exclusions), the doctrine of waiver is simply inapplicable" (*Albert J. Schiff*, 51 NY2d at 698). Thus, where the putative insured fails to establish coverage, it is not created by the insurer's failure timely to disclaim coverage (*id.*). It does not follow, ****5** however, that when an insurer asserts that no policy was in effect during the relevant period, an untimely-notice *defense* to coverage need not be timely asserted.

OneBeacon's argument would be more compelling if the duties of an insurer to disclaim coverage in a timely, specific and nonselective manner were imposed solely by the terms of the contract of insurance. As noted above, however, those duties are imposed by law. So, too, at least where the policy is silent on the subject, the conditions of reasonable notice of occurrence and reasonable notice of claim are implied into every insurance contract (*see Olin Corp. v Insurance Co. of N. Am.*, 743 F Supp 1044, 1051 [SD NY 1990] [construing New York law], *affd* 929 F2d 62 [2d Cir 1991]). Thus, as Lauder argues, knowledge of the policy's actual terms is not necessary to assert such defenses to coverage.[5]

Although there appears to be a paucity of precedent on the issue, OneBeacon's position is inconsistent with *Burt Rigid Box, Inc. v Travelers Prop. Cas. Corp.* (302 F3d 83 [2d Cir 2002]). In that case, the insurer defended in a coverage action brought by the insured on the ground, among others, that the insured had failed to prove the existence and terms of the alleged policies and thus that it was an insured (*id.* at 88-90). Nonetheless, construing New York law, a panel of the Second Circuit concluded that the insurer had waived its right to assert untimely notice when, in its answer, it disclaimed coverage on a number of specific grounds without specifically listing untimely notice (*id.* at 95-96). Although the panel did not expressly discuss the argument pressed by the insurer in the District Court that "a dispute over whether an insurance policy was ***39** ever issued negates the putative insurer's obligation to disclaim based on untimely notice of an occurrence" (126 F Supp 2d 596, 632 [WD NY 2001]), it implicitly rejected that argument.

We agree, moreover, with the reasoning of Magistrate Judge Foschio that

> "[i]mposing the duty on the insurer to provide an early disclaimer based on late notice of an occurrence or claim, even where the insurer claims there is no policy, enables the insured to make a prompt and fully informed decision as to whether to pursue efforts to establish the existence of the policy or to better invest its resources on investigating the potential claim, and preparing a defense" (*id.* at 633).

Acceptance of OneBeacon's argument that an insurer is absolved of any duty to make timely, specific and nonselective disclaimers on the basis of defenses to coverage when the insurer denies that a policy was issued would entail an extraordinary proposition: that if the ****6** insurer ultimately is found to have issued the

policy—even after litigation over a period of years—the insurer nonetheless still can disclaim on the basis of defenses to coverage it could have asserted prior to or at the outset of the litigation.

Finally, although Supreme Court denied Lauder's motion for partial summary judgment on its third and fourth causes of action, it did not discuss that motion in its decision and apparently denied it as moot given its determination that OneBeacon was entitled to summary judgment dismissing the complaint. We grant Lauder's motion. Lauder came forward with sufficient secondary evidence of the disputed pre-1971 policy—including, specifically, a renewal policy issued to it by OneBeacon's predecessor stating in the declaration page that the policy being renewed is the disputed policy, No. E16-40036-27, and two certificates of insurance signed by the predecessor in 1969 and 1970, both certifying, among other things, that the policy, No. E16-40036-27, was issued to Lauder effective September 18, 1968 with an expiration date of September 18, 1971—to establish the existence of the policy and to invoke the presumptions that the terms of the renewal policy are identical to the terms of the policy being renewed and that the policy being renewed, like the renewal policy, was a three-year policy ending on September 18, 1971 (*see Century Indem. Co. v Aero-Motive Co.*, 254 F Supp 2d 670, 692 [WD Mich 2003] [upholding insured's ***40** reliance "on the rule that unless an agreement to the contrary is shown, a renewal policy is presumed to be on the same terms, conditions, and amounts as provided in the original policy"]; *Lewitt & Co., Inc. v Jewelers' Safety Fund Socy.*, 249 NY 217, 222 [1928] ["Clearly, a policy which renews an old policy must renew the terms of that policy as they stood at the moment of expiration. An agreement to *renew* a policy[ ] implies that the terms of the existing policy are to be continued . . . in the absence of evidence[ ] that a change was intended" (internal quotation marks omitted)]). As Lauder would be entitled to a defense under the duty-to-defend clause in the renewal policy, it adduced sufficient evidence on its motion to establish that it is entitled to a defense in the underlying actions that are the subject of its third and fourth causes of action.[6] ****7**

In its opposition, OneBeacon failed to meet its burden of coming forward with evidentiary facts sufficient to raise any material issues of fact that would require denial of Lauder's motion (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]*; S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 343 [1974]). As the affidavit of Lauder's expert submitted in its reply convincingly demonstrates, OneBeacon's expert offered only unsupported assumptions and speculation (*see Aero-Motive*, 254 F Supp 2d at 692-693; *Batista v Rivera*, 5 AD3d 308, 309 [2004]; ***41** *Warden v Orlandi*, 4 AD3d 239, 242 [2004]; *Leggio v Gearhart*, 294 AD2d 543, 545 [2002]). For this same reason, OneBeacon failed to raise a material issue of fact supporting its position—on which it bears the burden of proof (*see Town of Massena v Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435, 444 [2002])—that the disputed policy would have contained a pollution exclusion during the entire policy period.

Accordingly, the order of Supreme Court, New York County (Carol R. Edmead, J.), entered December 12, 2006, which granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's motion for summary judgment on its third and fourth causes of action and plaintiff's cross motion to dismiss defendants' defense of untimely notice, should be reversed, on the law, with costs, defendants' motion for summary judgment should be denied, plaintiff's motion for summary judgment on its third and fourth causes of action granted, plaintiff's cross motion for summary judgment dismissing defendants' untimely notice defense with respect to plaintiff's first and second causes of action granted, and the matter remanded to Supreme Court for further proceedings.

Tom, J.P., Saxe, Friedman and Gonzalez, JJ., concur.

Order, Supreme Court, New York County, entered December 12, 2006, reversed, on the law, with costs, defendants' motion for summary judgment denied, plaintiff's motion for summary judgment on its third and fourth causes of action granted, plaintiff's cross motion for summary judgment dismissing defendants' untimely notice defense with respect to plaintiff's first and second causes of action granted, and the matter remanded to Supreme Court for further proceedings.

FOOTNOTES

[1] However, "where the issue is the existence or nonexistence of coverage (e.g., the insuring clause and exclusions), the doctrine of waiver is simply inapplicable" (*Albert J. Schiff Assoc. v Flack*, 51 NY2d 692, 698 [1980]).

[2] We came to the same conclusion in *Benjamin Shapiro Realty Co. v Agricultural Ins. Co.* (287 AD2d 389 [2001]). There, we held that an insurer had waived the defense of untimely notice of occurrence

when its disclaimer letter asserted a different lack of notice ground. Although it is not mentioned in our memorandum decision, Lauder correctly points out that the disclaimer letter in *Benjamin Shapiro* asserted that nothing in the letter should be construed "as a waiver of any of the terms and conditions of the policy, or of any rights or defenses provided by law, all of which are expressly reserved."

[3] For this reason, Supreme Court denied Lauder's cross motion to dismiss OneBeacon's defense of untimely notice. For this same reason, and because Supreme Court concluded that Lauder had failed to give timely notice, Supreme Court granted OneBeacon's motion for summary judgment dismissing the complaint.

[4] As noted above, the November 2002 letter also stated that OneBeacon "stands by its prior *disclaimers* of coverage with regard to the *pre*-1971 policies issued by [its predecessor]" (emphasis added). OneBeacon plausibly argues that put in context the reference to "*pre*-1971" policies reflects a typographical error and that the letter intended and could only have been understood to refer to other, *post*-1971 policies. Given our view that the substance of both letters should be controlling, we think it irrelevant that in its November 2002 letter OneBeacon may not have expressly characterized the July 2002 letter as a "disclaimer[ ]" of coverage. We note, however, that a header to the November 2002 letter denominates the letter as a "SUPPLEMENTAL DISCLAIMER OF COVERAGE/RESERVATION OF RIGHTS." We note, too, that in separate letters dated November 11, 1999 relating to the claims arising out of the Blydenburgh and Huntington landfills, OneBeacon informed Lauder that "[a]s soon as we have completed our investigation, we will notify you of our coverage determination." Because OneBeacon stated that it was "terminating its investigation" in its July 2002 letter, Lauder argues that the November 11, 1999 letters afford an additional reason to conclude that the July 2002 and November 2002 letters constitute disclaimers, i.e., the promised "coverage determination."

[5] OneBeacon does not argue that policies it issued during the period in question relieved its insureds of these duties. To the contrary, OneBeacon's expert asserted that if the alleged policy existed, it "would have required Estee Lauder to notify the insurer in writing of the particulars of an 'occurrence' 'as soon as practicable' and to 'immediately' forward any claims made or suits brought against the insured to the insurer." Moreover, as Lauder observes, even as OneBeacon asserted in the seventh affirmative defense of its answer that Lauder had not proven the existence and terms of the disputed policy, OneBeacon's fourth affirmative defense asserted that it was not liable to the extent Lauder had failed to perform conditions that may be contained in the alleged policy "including, but not limited to, the notice . . . requirements."

[6] The third cause of action alleges that OneBeacon breached its duty to defend Lauder in the Hickey's Carting action and claims that Lauder is entitled to recover all posttender reasonable fees and expenses necessarily incurred in defense of that action, plus prejudgment interest accruing from the date of OneBeacon's repudiation of its duty to defend. Although the third cause of action identifies that date as "October 2002," that date appears to reflect a typographical error as Lauder contends only that OneBeacon disclaimed coverage in its November 1, 2002 letter. We do not understand Lauder to be claiming that it is entitled to fees and expenses in excess of the applicable policy limits. The fourth cause of action claims that with respect to any future defense costs Lauder may incur in defense of the Blydenburgh landfill claim and the Hickey's Carting action, it is entitled to a declaration that such defense costs must be paid promptly by OneBeacon to the extent that they are reasonable and necessary. Again, we do not understand Lauder to be seeking the recovery of defense costs in excess of the applicable policy limits. The fourth cause of action also claims that Lauder is entitled to a declaration that any reasonable settlement of the Blydenburgh landfill claim and the Hickey's Carting action must be timely indemnified by OneBeacon up to the applicable loss limits. However, Lauder does not mention this claim for indemnification in its briefs and thus we limit the declaration to the claim for defense costs. Finally, for reasons that are not explained by Lauder in its briefs, it did not move for summary judgment on its first and second causes of action, asserting breach of contract on account of OneBeacon's failure to provide a defense to and repudiation of its obligation to indemnify with respect to, respectively, the Huntington landfill and Blydenburgh landfill cases.

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2015 WL 535962 (N.Y.Sup.) (Trial Order)
Supreme Court, New York.
New York County

ESTEE LAUDER INC., Plaintiff,
v.
ONEBEACON INSURANCE GROUP, LLC (successor in interest to CGU Insurance, f/k/a Employers Group of Insurance Companies, Employers Commercial Union Insurance Co. of America and Commercial Union Insurance Company), Onebeacon Insurance Company and Onebeacon America Insurance Company, Defendants.

No. 602379/05.
February 10, 2015.

Decision/Order

Hon. Carol R. Edmead, J.S.C.

Motion Seq. 021 and 022

MEMORANDUM DECISION

***1** Plaintiff Estee Lauder Inc. ("Estee Lauder") commenced this insurance declaratory judgment action to compel defendants OneBeacon Insurance Group, LLC,[1] OneBeacon Insurance Company and OneBeacon America Insurance Company (together, "OneBeacon") to pay defense costs and indemnify it for underlying claims brought against Estee Lauder arising from the alleged dumping of hazardous wastes in two landfills on Long Island.

[1] All of OneBeacon's predecessors will also be referred to as "OneBeacon."

OneBeacon now moves to amend its Answer to reassert several affirmative defenses (motion sequence 002), and for summary dismissal of the complaint based on such affirmative defenses (motion sequence 001) as a result of the Court of Appeals' recent decision in *Key-Span Gas East Corporation v Munich Reinsurance America*, 23 NY3d 583 [2014] ("*Key-Span*").[2]

[2] Motion sequence numbers 021 and 022 are consolidated for joint disposition herein.

Factual Background

This action arises from an insurance policy allegedly issued to Estee Lauder by Employers' Liability Assurance Corp., Ltd ("ELAC") in 1968 (the "Policy") (Amended Complaint, ¶¶16-17). OneBeacon allegedly assumed the obligations of ELAC imposed by the Policy (Amended Complaint, ¶¶19-21). The Policy obligated the carrier to defend and reasonably settle any claims asserting that the Estee Lauder was potentially responsible for "property damage" inflicted during the term of the Policy, *i.e.*, September 18, 1968 to September 18, 1971 (Amended Complaint, ¶26).

In 1998, Estee Lauder signed tolling agreements whereby New York State agreed to "forgo" the commencement of an action to recover costs from Estee Lauder for the hazardous waste disposals at the Blydenburgh and Huntington Landfill (the "Landfills") until 1999, while the State further investigated the matter (the "1998 Tolling Agreements").[3]

[3] In connection withe the Blydenburgh Tolling Agreement, the State issued a letter advising Estee Lauder that Estee Lauder "may be responsible for" the hazardous waste disposal at the Blydenburgh Landfill.

In 1999, the State specifically identified Estee Lauder as a potentially responsible party ("PRP") concerning the hazardous waste disposals at the Landfills (collectively, the "Landfill PRP Claims"). In 2001, the State filed a Federal Court action[4] seeking recovery of costs it incurred to remediate the Blydenburgh Landfill; a third-party action was filed against Estee Lauder in that action (together, the three claims are referred to as the "Environmental Claims").

[4] *State of New York v Hickey's Carting, Inc.*, Case No. CV 01-3136 (EDNY) (*"Hickey's Carting"*).

***2** When Estee Lauder tendered the defense of the Environmental Claims (Amended Complaint, ¶¶ 31, 40, and 48), OneBeacon declined to defend or settle the three claims (Amended Complaint, ¶¶ 35, 41, and 49). As a result, this declaratory judgment action ensued.

Estee Lauder amended its complaint in June 2005 (the "First Amended Complaint"), and in September 2005, OneBeacon interposed the following four affirmative defenses, which are collectively referred to herein as the "Late Notice" defenses:

FOURTH AFFIRMATIVE DEFENSE

OneBeacon is not liable to Plaintiff to the extent that there has been a failure to perform or comply with any of the obligations or conditions that may be contained in the alleged insurance policy allegedly issued by ELAC, including, but not limited to, the notice and cooperation requirements.

EIGHTH AFFIRMATIVE DEFENSE

OneBeacon has no contractual duty to defend or obligation to defend and/or reimburse defense costs and/or to indemnify Plaintiff.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Coverage under the alleged ELAC insurance policy is available only to an insured under the alleged ELAC insurance policy. To the extent that Plaintiffs First Amended Complaint asserts claims for defense or reimbursement of defense costs and/or recovery of losses sustained by entities and/or persons who do not qualify as insureds under the alleged ELAC insurance policy, there is no coverage.

THIRTY-EIGHTH AFFIRMATIVE DEFENSE

OneBeacon is not liable to Plaintiff to the extent that Plaintiff has failed to comply with the notice requirements of the alleged ELAC insurance policy. To the extent that OneBeacon was not provided with timely and proper notice as required by the alleged ELAC insurance policy with respect to the alleged occurrences, claims or suits alleged in Plaintiffs First Amended Complaint, OneBeacon is not liable to defend or indemnify Plaintiff.

As relevant herein, OneBeacon previously moved to dismiss the amended complaint on the ground of Estee Lauder failed to provide prompt notice of the Environmental Claims. Estee Lauder cross moved to dismiss OneBeacon's Late Notice defenses (Decision, p. 2).

By order dated December 11, 2006, the Court granted OneBeacon's motion and dismissed the complaint on the ground that Estee Lauder violated the notice provisions of the alleged Policy by providing late notice of the Environmental Claims.

On appeal, the First Department held that OneBeacon *waived* any defenses based on late notice, and thus, was obligated to pay the "reasonable and necessary" costs Estee Lauder incurred in defending the Environmental Claims (the "First Department Decision").[5] Citing *Matter of Firemen's Fund Ins. Co. of Newark v Hopkins* (88 N.Y.2d 836, 837, 644 N.Y.S.2d 481, 666 N.E.2d 1354 [1996]),[6] the First Department declared that "[a]n insurer must give written notice of disclaimer on the ground of late notice as soon as is reasonably possible after it learns of the accident or of grounds for disclaimer of liability, and failure to do so precludes effective disclaimer" (62 A.D.3d at 35).

[5] *Estee Lauder Inc. v OneBeacon Ins. Group, LLC*, 62 A.D.3d 33, 873 N.Y.S.2d 592 [1st Dept 2009] (". . . [A]n insurer is deemed . . . to have intended to waive a defense to coverage where other defenses are asserted, and where the insurer possesses sufficient knowledge . . . of the circumstances regarding the unasserted defense" . . . . "On the basis of, among other things, a tolling agreement between Lauder and the Attorney General relating to the Blydenburgh landfill claim that Lauder produced to OneBeacon in April 2000 . . ., a notice of potential claim relating to the Huntington landfill that Lauder provided to OneBeacon in 1987 and a notification made by Lauder to OneBeacon . . . in May 1999 that the Attorney General had identified it as a "potentially responsible party" in connection with the Huntington landfill, it is clear that long before its July 2002 and November 2002 letters OneBeacon had sufficient knowledge of the circumstances relating to its defense of untimely notice")).
Thereafter, OneBeacon paid Estee Lauder nearly $5 million for defense costs.

[6] In *Firemen's Fund Ins. Co. of Newark v Hopkins*, the Court of Appeals upheld the First Department's denial of an automobile insurer's petition to stay arbitration of uninsured motorist's claim, on the ground of that the insurer's delay in giving notice of disclaimer of coverage was unreasonable.

***3** Thereafter, in May 2012, OneBeacon filed an Amended Answer to Estee Lauder's Third Amended Complaint, omitting the Late Notice Defenses.

On June 10, 2014, the Court of Appeals issued its decision in *Key-Span*, which addressed an insureds' (similar) claim that their insurers had a duty to defend and indemnify them for environmental damage claims arising from gas plant sites. The Court of Appeals specifically stated, in a footnote, that:

> To the extent [the First Department Decision] *Estee Lauder Inc. v OneBeacon Ins. Group, LLC*, 62 A.D.3d 33, 873 N.Y.S.2d 592 (1st Dept.2009), cited by the Appellate Division here, and other Appellate Division cases hold that Insurance Law § 3420(d)(2) applies to claims not based on death and bodily injury (*see Hotel des Artistes, Inc. v General Acc. Ins. Co. of Am.*, 9 A.D.3d 181, 193, 775 N.Y.S.2d 262 [1st Dept.2004] . . . those cases were wrongly decided and should not be followed.

In support of its instant motion to amend, OneBeacon contends that *Key-Span* effectively overruled the First Department Decision, and that the question of whether OneBeacon was required to defend or indemnify Estee Lauder is once again before the Court. Leave to amend should be freely granted, and denied if there is no showing of prejudice or surprise from any delay or if the amendment is palpably improper. Estee Lauder cannot demonstrate a sufficient level of prejudice, as it has not been hindered in contesting OneBeacon's previously asserted Late Notice Defenses, and such affirmative defenses are valid.

In opposition, Estee Lauder argues that OneBeacon's issuance of correspondence disclaiming coverage on selective grounds and concealing the "late notice" ground constitutes a constructive waiver of such "late notice" defense by operation of common law, irrespective of whether the underlying claim is for bodily injury or property damage. The First Department's

Decision held that such conduct constituted a waiver pursuant to New York common law, and such Decision is law of the case, which this Court must follow. The underlying suit did not allege bodily injury, and the First Department did not cite Section 3420; instead, the First Department stated that its "conclusion" was the same one it reached in another case, which case involved a property damage claim; the First Department then also cited to another case which applied the common law in a property damage case. Further, *Key-Span* did not address the issue before the First Department, *to wit*: whether an insurer waives "late notice" by issuing a disclaimer letter that discloses some grounds to deny coverage while concealing the "late notice" ground. And, unlike OneBeacon herein, the insurer in *Key-Span* first disclaimed on the "late notice" ground. *Key-Span* did not affirmatively overturn the First Department Decision in its entirety, but overruled said Decision only "to the extent" that the First Department declared that the mere passage of time is sufficient to compel a finding of waiver in a case that is not a bodily injury matter subject to Section 3420. Thus, *Key-Span* left standing the already established body of caselaw holding that a New York insurer who issues a disclaimer disclosing only some coverage defenses is deemed to have waived all known but concealed coverage-forfeiture defenses (such as "late notice.")

***4** *Key-Span* also did not address or change caselaw holding that a defendant who withdraws, during discovery, a forfeiture defense is deemed conclusively to have waived whatever rights it had to further litigate the merits of such defense. When OneBeacon amended its answer in 2011 omitting the Late Notice Defenses after its claims handler gave certain testimony, such omission constitutes a waiver of same.

Consequently, the proposed Late Notice Defenses lack merit because (1) they were waived by OneBeacon's voluntary withdrawal of same, more than 26 months after the First Department ruled, and (2) OneBeacon's claims handler testified that both of the Landfill PRP claims were "made" and "noticed" to Estee Lauder in "1999" (and not "1998" as OneBeacon originally argued in its 2006 summary judgment motion) and thus, such claims were noticed within a reasonable time (two months) to OneBeacon in mid-May 1999. OneBeacon's admission that the Landfill PRP Claims were "made" in 1999 explains its voluntary and intentional abandonment of its Late Notice Defenses, or at a minimum, creates an issue of fact on the issue.[7]

[7] OneBeacon's admission came in 2011, and therefore, was not part of the record when this Court granted summary judgment in OneBeacon's favor in 2006.

And, that the Late Notice Defenses are absent from the pleadings conclusively establishes the insurer's intent to not litigate the issue going forward. Caselaw provides that an insurer is deemed to waive a late notice defense where its answer on file at the time it sought adjudication of such issue failed to plead late notice. OneBeacon did not present an affidavit explaining its intent in keeping its defenses for 26 months after the First Department Decision and then withdrawing them. And, the "threat" of a lawsuit contained in the 1998 Tolling Agreements may constitute an "occurrence," but did not trigger Estee Lauder's "notice-of-claim" obligation to OneBeacon. Nor could such Tolling Agreements trigger the notice of occurrence obligation because they did not allege injurious conduct or damage within the policy period.[8]

[8] It is noted that the Court's Decision addressed whether the 1998 Tolling Agreements triggered Estee Lauder's obligation to timely notify OneBeacon pursuant to the Policy ("This Court finds that the two 1998 Tolling Agreements constituted sufficient notice to Estee Lauder that the State might bring suit against it as to both the Environmental Claims, and potential lawsuits based on the Environmental Claims, sufficient to trigger Estee Lauder's obligation to notify OneBeacon under the terms of the putative policy." (Decision, p. 18).

There is no precedent permitting a party to reinstate a withdrawn claim or defense based on the party's mistaken assumption about future developments in the law, and to permit such would "invite dangerous precedent." In order to preserve any right to benefit from a change in the law, the party must not withdraw its claim or defense.

***5** Further, the issue of prejudice need not be reached given that the proposed amendment is futile.

Therefore, OneBeacon cannot move for summary judgment on claims it waived by its voluntary withdrawal of same.

In reply, OneBeacon argues that its motion for leave should be granted since OneBeacon did not allege any prejudice by the

amendment.

Further, OneBeacon did not irrevocably waive its right to defend on late-notice grounds by temporarily withdrawing its Late Notice Defenses. In any event, in the absence of prejudice, caselaw permits an amendment to reassert defenses deemed waived. Because Estee Lauder's complaint alleges that it fully performed under the purported contract, OneBeacon was only required to assert a general denial to put all contractual defense at issue. OneBeacon has maintained precisely that kind of general denial at all times in this case. Particularly, the current version of the Fourth Affirmative Defense alleges that OneBeacon is not liable as Estee Lauder failed to comply with the conditions in the alleged Policy "included, but not limited to, subrogation and cooperation requirements." A version of this affirmative defense has appeared in every iteration of OneBeacon's Answer and CPLR 3015 does not require any additional. The cases cited by Estee Lauder are factually distinguishable. And, the "as soon as is reasonably possible" standard cited in the First Department Decision (62 A.D.3d at 35) comes directly from Insurance Law 3420, and is inapplicable here.

Discussion

"It is fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party" (*Kocourek v Booz Allen Hamilton Inc.*, 925 NYS2d 51 [1st Dept 2011] citing CPLR 3025[b] and *Solomon Holding Corp. v Golia*, 55 A.D.3d 507, 868 N.Y.S.2d 612 [2008]). "Mere delay is insufficient to defeat a motion for leave to amend" (*Kocourek citing Sheppard v Blitman/Atlas Bldg. Corp.*, 288 A.D.2d 33, 34, 734 N.Y.S.2d 1 [2001]). "Prejudice requires 'some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position' " (*Kocourek citing Cherebin v Empress Ambulance Serv., Inc.*, 43 A.D.3d 364, 365, 841 N.Y.S.2d 277 [2007], *quoting Loomis v Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23, 444 N.Y.S.2d 571, 429 N.E.2d 90 [1981]).

***6** Here, OneBeacon established the absence of surprise or prejudice to Estee Lauder resulting from the proposed Late Notice Defenses, and that such Defenses are arguably meritorious.

In abrogating the First Department Decision on which Estee Lauder relies as law of the case, the Court of Appeals in *Key-Span* reasoned, that "By its plain terms, section 3420(d)(2) applies only in a particular context: insurance cases involving death and bodily injury claims arising out of a New York accident and brought under a New York liability policy" (23 N.Y.3d at 590). Thus, since "the underlying claim [therein did] not arise out of an accident involving bodily injury or death, the ["heightened"] notice of disclaimer provisions set forth in Insurance Law § 3420(d) are inapplicable" *(id.)*. Pointedly, the Court of Appeals held that "The environmental contamination claims at issue in this case do not fall within the scope of Insurance Law § 3420(d)(2), which the legislature chose to limit to accidental death and bodily injury claims, and it is not for the courts to extend the statute's prompt disclaimer requirement beyond its intended bounds." The standard in such cases is whether "under *common-law principles*, triable issues of fact exist whether defendants *clearly manifested an intent to abandon their late-notice defense*" (*id.*, at 591) (emphasis added). Thus, the "Appellate Division erred when it held that defendants had a duty to disclaim coverage 'as soon as reasonably possible' after they learned that LILCO's notice was untimely under the policies." (*id.*, at 591)

Like the Appellate Division's decision in *Key-Span*,[9] the First Department Decision herein did not specifically cite to section 3420(d)(2), but cited to its disclaimer requirements[10] ("[a]n insurer must give written notice of disclaimer on the ground of late *notice as soon as is reasonably possible* after it learns of the accident or of grounds for disclaimer of liability,"). The First Department Decision also cited to the case, *Firemen's Fund Ins. Co. of Newark*, which involved an automobile insurer's delay in giving notice of disclaimer in connection with a personal injuries sustained from an automobile accident (emphasis added). The First Department began its legal synopsis with a citation to a case involving a motor vehicle accident, *General Acc. Ins. Group v Cirucci* (46 NY2d 862 [1979]), for the proposition that an insurer's "notice of disclaimer must promptly apprise the claimant with a *high degree of specificity* of the ground or grounds on which the disclaimer is predicated." (Emphasis added).

[9] In *Key-Span*, the Court of Appeals noted: "Although the Appellate Division did not cite section 3420(d)(2) in its decision, the court essentially recited the statute's disclaimer requirement when it stated that defendants had an 'obligation' to disclaim coverage based on late notice "as soon as reasonably possible after first learning of the ... grounds for disclaimer" . . . ."

[10] 3420(d)(2) provides that "If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice *as soon as is reasonably possible of such disclaimer* of liability or denial of coverage to the insured and the injured person or any other claimant" (emphasis added).

***7** Notwithstanding the First Department's additional citations to other cases involving a waiver in property damage cases, the First Department's principal citation to the rule requiring that a disclaimer be both timely and specific implicates that the 3420 standard was heavily imposed. Notably, the First Department Decision is silent as to whether there was sufficient evidence of OneBeacon's "clear manifestation of an intent to waive a defense," which is the sole standard applicable in a common law waiver analysis.

Thus, as it cannot be said that the First Department Decision finding of waiver was based upon the application of common-law principles, the First Department Decision has been effectively abrogated by *Key-Span*. Consequently, the First Department's finding that OneBeacon waived the Late Notice Defenses is no longer binding in this pending action.

As to Estee Lauder's claim that OneBeacon waived its right to assert the Late Notice Defenses, such that neither leave to amend nor summary judgment can be granted, whether "an insurer has waived the defense of late notice is ordinarily a question of fact, which is proved by evidence that the insurer intended to abandon that defense" (*Marino v New York Tel. Co.*, 1992 WL 212184, at *7, *13-14, 1992 U.S. Dist. LEXIS 12705, *25-26, *47-49 [S.D.N.Y.1992] [internal citation and quotation marks omitted] [excess insurer waived defense of late notice under the common law by failing to issue a timely disclaimer]). Waiver "is the voluntary relinquishment of a known right and must be predicated upon knowledge of the facts upon which the existence of the right depends (*Long Island Lighting Co. v American Re-Insurance Co.*, 123 A.D.3d 402, 998 N.Y.S.2d 169 [1st Dept 2014] *citing Amrep Corp. v American Home Assur. Co.*, 81 A.D.2d 325, 329, 440 N.Y.S.2d 244 [1st Dept 1981] ["issue of fact concerning waiver existed, where, with knowledge of pending charges against its insureds, the insurer continued to issue policy renewals and did not disclaim coverage until interposing an answer in the declaratory judgment action"]). The failure to assert a known policy defense may constitute a waiver (*see State of New York v Amro Realty Corp.*, 936 F.2d 1420, 1429-1430 [2d Cir.1991] [insurer waived late notice defense in environmental coverage action where it was capable of asserting a disclaimer based on late notice before the complaint was filed]).

Here, it cannot be said that OneBeacon "forever" waived its right to assert the Late Notice Defenses by virtue of its disclaimer letters omitting any reference to such Defenses or by its subsequent voluntary withdrawal of such Defenses from its pleading. First, as this Court previously stated in its Decision, that "where an insurer expressly reserves all its rights under the insurance contract to disclaim a claim, there is no waiver of any particular ground, merely because it was not made in the initial letter of disclaimer" (Decision, p. 23). Further, the First Department has recognized that leave to amend "shall be freely given" "at any time" (CPLR 3025 [b]), *even as to defenses deemed "waived"* [previously] pursuant to CPLR 3211 (e) when not raised 'either by ... motion or in the responsive pleading.' " (*Marks v Macchiarola*, 221 A.D.2d 217, 634 N.Y.S.2d 56 [1st Dept 1995]; *see also Ficorp, Ltd. v Gourian*, 263 A.D.2d 392, 693 N.Y.S.2d 37 [1st Dept 1999] ("Although CPLR 3211 (e) does deem the defense of release waived if not asserted in the answer or in a motion to dismiss, it can be raised in an amended answer in the absence of prejudice")). "It is the insured's burden to show that there was 'a clear manifestation of intent' by the insurer to abandon its right to assert a defense (*Sulner v G.A. Ins. Co. of N.Y.*, 224 A.D.2d 205, 637 N.Y.S.2d 144 [1st Dept 1996]; *see also Gilbert Frank Corp. v Federal Ins. Co.*, 70 N.Y.2d 966, 520 N.E.2d 512 [1988]).

***8** Here, OneBeacon has indeed argued that it removed the Late Notice Defense language from its affirmative defenses only after the First Department's reversal effectively rendered OneBeacon's Late Notice Defenses moot, when settlement negotiations failed, and OneBeacon made a payment to Estee Lauder pursuant to the First Department Decision in order to cease the continued running of interest. Thus, OneBeacon's withdrawal is a mere factor to consider under common law principles of waiver, and it cannot be said, as a matter of law, that OneBeacon withdrew its Late Notice Defenses with an intent to waive them.

In light of the undeveloped record as to OneBeacon's intent in withdrawing the Late Notice Defenses, Estee Lauder failed, at this juncture, to establish that OneBeacon's Late Notice Defenses lack merit so as to bar its application to amend its Answer

to assert same.

Furthermore, Estee Lauder failed to sufficiently assert a claim of surprise or prejudice in its preparation of its defense to any Late Notice Defense raised by OneBeacon.

Therefore, OneBeacon's motion for leave to assert the Late Notice Defenses is granted.

However, summary judgment in favor of OneBeacon based upon such Defenses is unwarranted, at this juncture. OneBeacon essentially argues that *Key-Span* mandates that this Court reinstate its earlier Decision, in which it purportedly found that (1) Estee Lauder failed as a matter of law to provide timely notice of its claims, and (2) OneBeacon reserved its rights to decline coverage and did not waive its Late Notice Defenses.

As pointed out by OneBeacon, this Court found that Estee Lauder failed, as a matter of law, to provide timely notice of its claims based on Estee Lauder's receipt of the 1998 Tolling Agreements, one of which gave rise to the *Hickey's Carting* claim against Estee Lauder. However, sworn testimony concerning the circumstances giving rise to OneBeacon's withdrawal of the Late Notice Defense during this litigation must be explored; such factors did not exist at the time of this Court's Decision.

Conclusion

Based on the foregoing, it is hereby

ORDERED that OneBeacon's motion for leave to amend and its Answer to reassert its "Late Notice" affirmative defenses (motion sequence 022), is granted, and OneBeacon shall serve and file its Second Amended Answer to Third Amended Complaint in the form attached to its motion; and it is further

ORDERED that OneBeacon's motion for summary dismissal of the complaint based on such "Late Notice" affirmative defenses (motion sequence 021) is denied; and it is further

ORDERED that the parties shall appear for a status conference on March 31, 2015, 2:15 p.m.; and it is further

ORDERED that OneBeacon shall serve a copy of this order with notice of entry within 20 days of entry.

***9** This constitutes the decision and order of the Court.

Dated: February 9, 2015

<<signature>>

Hon. Carol R. Edmead, J.S.C.

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2015 WL 1549058 (N.Y.Sup.), 2015 N.Y. Slip Op. 30520(U) (Trial Order)
Supreme Court, New York.
New York County

ESTEE LAUDER INC., Plaintiff,
v.
ONEBEACON INSURANCE GROUP, LLC (successor in interest to CGU INSURANCE, f/k/a Employers Group of Insurance Companies, Employers Commercial Union Insurance Co. of America and Commercial Union Insurance Company), Onebeacon Insurance Company and Onebeacon America Insurance Company, Defendants.

No. 602379/05.
April 7, 2015.

Decision/Order

Hon. Carol R. Edmead, J.S.C.

Motion Seq. 023

MEMORANDUM DECISION

***1** Plaintiff Estee Lauder Inc. ("Estee Lauder") commenced this insurance declaratory judgment action to compel defendants OneBeacon Insurance Group, LLC,[1] OneBeacon Insurance Company and OneBeacon America Insurance Company (collectively, "OneBeacon") to pay defense costs and indemnify it for underlying claims brought against Estee Lauder arising from the alleged dumping of hazardous wastes in two landfills on Long Island.

[1] All of OneBeacon's predecessors will also be referred to as "OneBeacon."

OneBeacon now moves for leave to reargue the branch of its motion for summary judgment motion, which this Court denied.

Factual Background

In 1999, the State identified Estee Lauder as a potentially responsible party ("PRP") concerning hazardous waste disposals at certain landfills, *to wit:* the Blydenburgh Landfill and Huntington Landfill (the "Landfills") (collectively, the "Landfill PRP Claims"). In 2001, the State filed a Federal Court action (*State of New York v Hickey's Carting, Inc.*, Case No. CV 01-3136 (EDNY) (*"Hickey's Carting"*)), seeking recovery of costs it incurred to remediate the Blydenburgh Landfill, and a third-party action was filed against Estee Lauder in that action (together, the Landfill PRP Claims and third-party action are referred to as the "Environmental Claims").

In reliance on a certain insurance policy (the "Policy"), Estee Lauder tendered the defense of the Environmental Claims (Amended Complaint, ¶¶ 31, 40, and 48), and OneBeacon declined to defend or settle the three claims (Amended Complaint, ¶¶ 35, 41, and 49). As a result, this declaratory judgment action ensued.

In September 2005, OneBeacon interposed the four affirmative defenses, which are collectively referred to herein as the "Late Notice Defenses."

OneBeacon moved to dismiss the amended complaint on the ground that Estee Lauder failed to provide prompt notice of the

Environmental Claims. Estee Lauder cross moved to dismiss OneBeacon's Late Notice defenses. By order dated December 11, 2006, the Court granted OneBeacon's motion and dismissed the complaint on the ground that Estee Lauder provided late notice of the Environmental Claims in violation the notice provisions of the alleged Policy.

On appeal, the First Department held that OneBeacon *waived* any defenses based on late notice, and thus, was obligated to pay the "reasonable and necessary" costs Estee Lauder incurred in defending the Environmental Claims (the "First Department Decision").[2] The First Department stated:

2 *Estee Lauder Inc. v OneBeacon Ins. Group, LLC*, 62 AD3d 33, 873 NYS2d 592 [1st Dept 2009].

***2** . . . [A]n insurer is deemed ... to have intended to waive a defense to coverage where other defenses are asserted, and where the insurer possesses sufficient knowledge ... of the circumstances regarding the unasserted defense .... On the basis of, among other things, a tolling agreement between Lauder and the Attorney General relating to the Blydenburgh landfill claim that Lauder produced to OneBeacon in April 2000 ..., a notice of potential claim relating to the Huntington landfill that Lauder provided to OneBeacon in 1987 and a notification made by Lauder to OneBeacon ... in May 1999 that the Attorney General had identified it as a "potentially responsible party" in connection with the Huntington landfill, it is clear that long before its July 2002 and November 2002 letters OneBeacon had sufficient knowledge of the circumstances relating to its defense of untimely notice.

On March 6, 2012, Estee Lauder filed its Third Amended Complaint, which was followed by OneBeacon's Amended Answer to the Third Amended Complaint ("Amended Answer"); this Amended Answer omitted the Late Notice Defenses.

Two years later, on June 10, 2014, the Court of Appeals issued its decision in *Key-Span Gas East Corporation v Munich Reinsurance America*, 23 NY3d 583 [2014] ("*Key-Span*"), which addressed an insureds' (similar) claim that their insurers had a duty to defend and indemnify them for environmental damage claims arising from gas plant sites. In *Key-Span*, the Court of Appeals specifically stated, in a footnote, that:

> To the extent [the First Department Decision] *Estee Lauder Inc. v OneBeacon Ins. Group, LLC*, 62 A.D.3d 33, 873 N.Y.S.2d 592 (1st Dept.2009), cited by the Appellate Division here, and other Appellate Division cases hold that Insurance Law § 3420(d)(2) applies to claims not based on death and bodily injury (*see Hotel des Artistes, Inc. v General Acc. Ins. Co. of Am., 9* A.D.3d 181, 193, 775 N.Y.S.2d 262 [1st Dept.2004] . . . those cases were wrongly decided and should not be followed.

OneBeacon then moved to amend its Amended Answer to re-assert the Late Notice Defenses (motion sequence 022), and for summary dismissal of the complaint based on such affirmative defenses (motion sequence 021) as a result of *Key-Span*. OneBeacon argued that *Key-Span* effectively overruled the First Department Decision, and that the issue of whether OneBeacon was required to defend or indemnify Estee Lauder was once again before the Court.

***3** Estee Lauder opposed the motion, arguing that the proposed Late Notice Defenses lacked merit because (1) they were waived by OneBeacon's voluntary withdrawal of same, more than 26 months after the First Department ruled, and (2) OneBeacon's claims handler testified that both of the Landfill PRP claims were "made" and "noticed" to Estee Lauder in "1999" (and not "1998" as OneBeacon originally argued in its 2006 summary judgment motion) and thus, such claims were noticed within a reasonable time (two months) to OneBeacon in mid-May 1999. Estee Lauder also pointed out that the claims' handler's deposition testimony was, in part, the reason for OneBeacon's withdrawal of the Late Notice Defenses.

In reply, OneBeacon argued that Estee Lauder did not allege any prejudice by the amendment, and thus, the amendment should be permitted. OneBeacon also argued that it did not irrevocably waive its right to defend on late-notice grounds by temporarily withdrawing its Late Notice Defenses. In any event, in the absence of prejudice, caselaw permits an amendment to reassert defenses deemed waived.

By order dated February 9, 2015, this Court granted OneBeacon leave to reassert its Late Notice Defenses, but denied summary judgment on those Defenses, and stated as follows:

In light of the undeveloped record as to OneBeacon's intent in withdrawing the Late Notice Defenses, Estee Lauder failed, at this juncture, to establish that OneBeacon's Late Notice Defenses lack merit so as to bar its application to amend its Answer to assert same.

Furthermore, Estee Lauder failed to sufficiently assert a claim of surprise or prejudice in its preparation of its defense to any Late Notice Defense raised by OneBeacon.

Therefore, OneBeacon's motion for leave to assert the Late Notice Defenses is granted.

However, *summary judgment in favor of OneBeacon based upon such Defenses is unwarranted, at this juncture. OneBeacon essentially argues that Key-Span mandates that this Court reinstate its earlier Decision*, in which it purportedly found that (1) Estee Lauder failed as a matter of law to provide timely notice of its claims, and (2) OneBeacon reserved its rights to decline coverage and did not waive its Late Notice Defenses. *However, sworn testimony concerning the circumstances giving rise to OneBeacon's withdrawal of the Late Notice Defense during this litigation must be explored; such factors did not exist at the time of this Court's Decision*. (Emphasis added).

OneBeacon now moves for leave to reargue its summary judgment motion, arguing that summary judgment should have been granted because OneBeacon *was incapable* of waiving the right to assert a Late Notice Defense between February 2009 and June 2014 because the right did not exist. The First Department held in February of 2009 that OneBeacon could not invoke its right to prompt notice, and thus, as of February 2009, OneBeacon's right to raise a Late Notice Defense no longer existed. Thus, when OneBeacon removed the Late Notice Defenses by amending its answers filed in 2011 and 2012, it could not, as a matter of law, have permanently waived such Defenses, because the Defenses were not then rights OneBeacon could have enforced, as a matter of law. In mid-2014, when the Court of Appeals abrogated the First Department Decision in *Key-Span*, OneBeacon's Late Notice Defenses became available again.

***4** OneBeacon asserts that it was not possible for events pre-dating the creation of the right *(via Key-Span)* to give rise to a common law waiver, irrespective of the party's mindset, statements, or conduct. Since OneBeacon was unable to perform a common law waiver under these circumstances, the intent behind omitting from the amended answers is not legally relevant.[3] OneBeacon argues that for a litigant to be capable of waiving a contractual right, it must first know of the existence of an enforceable right, and then manifest the intent to relinquish it. Given that the Late Notice Defense was not a "known right" at the time OneBeacon withdrew it from its Amended Answer, the withdrawal could not have created a waiver of the defense. Consequently, no further factual inquiry or discovery is necessary for the Court to grant OneBeacon's summary judgment. Further, under caselaw, the failure to pre-emptively plead an affirmative defense that is only later established by an intervening higher court decision does not amount to waiver, because the availability of that defense was, as a matter of law, unknowable.

[3] OneBeacon further asserts that because a litigant's attorneys are generally responsible for the substantive defenses alleged in the pleadings, any factual investigation into the rationale for those defenses would necessarily involve privileged communications and work product. Requiring a party's lawyers to testify in a case is an exceedingly rare remedy. And, OneBeacon expects that its prior counsel, will, if required, provide testimony confirming the lack of any intent to waive OneBeacon's defenses.

In opposition, Estee Lauder first argues that OneBeacon's motion does not allege any overlooked or misapprehended facts or law. Instead, OneBeacon raises a new argument by its motion: that a conditional right is somehow not a "known" right, such that a conditional right can never be waived. In its Opposition brief below, Estee Lauder argued that "OneBeacon's post-suit conduct operated to waive late notice," and devoted a section of its Background to setting forth the known facts leading up to OneBeacon's curious withdrawal of its late notice defense. In its Reply, OneBeacon never argued that its conditional right to assert a late notice defense was immune from waiver by post-suit conduct or otherwise. Of the 14 cases OneBeacon cites in its present motion, only two of the cases were cited in OneBeacon's four briefs to this Court: the First Department Decision and *Key-Span*. The other 12 cases are all newly cited cases that OneBeacon erroneously cites as supporting its argument that a conditional right cannot be waived. OneBeacon cannot identify a single fact or element of law that was overlooked or misunderstood by this Court when it correctly denied OneBeacon's motion for summary judgment and ruled that discovery was necessary as to whether OneBeacon intended to waive its late notice defense. And, OneBeacon's attempt to limit the

discovery as to what it was thinking when it waived its right to assert the Late Notice Defenses is unwarranted, as such issue is an inherently factual issue of OneBeacon's state of mind presented by its position. Under the CPLR, Estee Lauder is entitled to all permissible discovery on this issue.

***5** Further, OneBeacon's right to assert a late notice defense always existed and was always known to OneBeacon. It is black letter law that a party can prospectively waive a known right it does not yet or currently possess.

Because OneBeacon (I) knew that it held a current right to plead late notice notwithstanding the First Department Decision (as OneBeacon continued to plead late notice for 26 months after the First Department Decision was decided), (ii) knew that it had a conditional right to pursue late notice (as it acknowledges here), (iii) took action inconsistent with an intention to pursue late notice even if the condition were to incur (admitting that the claims were made in 1999 while eliminating defenses that depended on a "1998" claim date), and (iv) presented no admissible evidence indicating anything but an actual-intent waiver, the current facts on record are sufficient to compel a finding of actual intent waiver. OneBeacon's cases involve parties who established they were truly ignorant that they held conditional or immediate rights at the time of their alleged waiving conduct.

Thus, the Court properly ruled that discovery is needed to evaluate the "circumstances giving rise to OneBeacon's withdrawal of the Late Notice Defense during this litigation."

In any event, OneBeacon did not raise the affirmative defense of late notice until three years after it issued its disclaimer letters in 2002. Then, it only raised its affirmative defense in its answer in 2005, and ultimately, in its 2006 summary judgment briefing. In 2009, without reaching whether Estee Lauder's notice was in fact late, the First Department held that OneBeacon waived its late notice defense by not including it in its 2002 disclaimer letters and ordered OneBeacon to pay Estee Lauder's Blydenburgh and *Hickey's Carting* defense costs. OneBeacon was then left with a difficult decision of either (a) continuing to argue that the claim was made in 1998, and be held responsible for defense costs starting in 1998 or (b) adopting Estee Lauder's position that the claim was made in 1999, thus saving it a year of defense costs, but ultimately abandon its ability to argue that Estee Lauder noticed the claim late (because it should have been noticed in 1998 following the Tolling Agreement). Because the First Department did not rule on when the claim was considered "made," the factual determination remained disputed by the parties. OneBeacon's actions following the First Department Decision provide objective *indicia* of OneBeacon's subjective intent to abandon its late notice defense, instead placing a higher premium on not paying defense costs starting in 1998.

Further, as of May 2011, OneBeacon still had not paid any of the legal fees Estee Lauder had incurred since 1998, despite the First Department's directive that such fees be paid "promptly." Instead, OneBeacon strategically began to change its position about when the claim was made. On May 6, 2011, OneBeacon removed late notice defense language from its answer. OneBeacon's new 2011 amended answer eliminated the reference to "notice" in its third affirmative defense, replacing the word with "subrogation."

***6** Further, OneBeacon removed entirely its thirty-eighth affirmative defense which originally asserted:

> OneBeacon is not liable to Plaintiff to the extent that Plaintiff has failed to comply with the notice requirements of the alleged ELAC insurance policy. To the extent that OneBeacon was not provided with timely and proper notice as required by the alleged ELAC insurance policy with respect to the alleged occurrences, claims or suits alleged in Plaintiff's First Amended Complaint, OneBeacon is not liable to defend or indemnify Plaintiff.

As to OneBeacon's position on the extent of its reimbursement liability for fees incurred in 1998, 1999, and after 1999, Estee Lauder took the organizational deposition of OneBeacon on May 11, 2011. OneBeacon's corporate designee and the claims handler for the Estee Lauder Policy, Ed Albanese ("Albanese"), testified that the underlying Potentially Responsible Party "claims" were "made" in 1999. Albanese further acknowledged that notice of the 1999 claims was provided to OneBeacon in mid-May 1999. This testimony was consistent with Estee Lauder's timeline of coverage events. Indeed, the Potentially Responsible Party letter for Blydenburgh was issued on March 18, 1999, and the Potentially Responsible Party letter for Huntington was issued on May 5, 1999. By deleting its Late Notice Defenses from its answer and agreeing that the claim was made in 1999 rather than 1998, OneBeacon effectively eliminated its prior judicial admission that Estee Lauder's notice was

late. And, in April 2012 when OneBeacon finally complied with the First Department's order to pay defenses costs, OneBeacon used the start date of 1999 rather than 1998 to calculate defense costs. Following payment, OneBeacon repeatedly represented to this Court and the First Department that by paying fees incurred in and after 1999 -- but nothing from 1998 -- OneBeacon had paid "all" defense costs incurred by Estee Lauder.

In so representing, OneBeacon judicially admitted once more that it determined that Estee Lauder's claims were made in 1999, and thus notice could not be late, even if it had a late notice defense available to it.

Even if OneBeacon's lawyer were to testify that he amended the answer in May 2011 merely to conform to the First Department Decision, such testimony will be no more credible than when OneBeacon's current lawyer, Michael Miller, averred to the same facts in the affirmation he signed under penalty of perjury (despite his lack of personal knowledge of same). As noted, the other May 2011 amendments continued to press allegations that the First Department Decision expressly rejected. Additionally, OneBeacon's new conclusory assertion, that its designee may have been confused when he swore in May 2011 that it was now OneBeacon's position that the underlying claims were made in "1999" cannot explain what OneBeacon's witness understood when it testified four years ago that the claims were made in 1999, not 1998.

***7** Estee Lauder contends that, although the First Department held that the Policy required OneBeacon to pay legal fees relating to the Blydenburgh and *Hickey's Carting* claims after those claims were made, it made no finding that Huntington-related fees were covered. However, OneBeacon had privately resolved that Huntington fees were covered (despite having pleaded in its May 2011 Answer that it owed no duty to defend any claim). Later in 2012, OneBeacon represented that it paid "all" costs incurred by Estee Lauder in connection with the "defense" of the "underlying claims relating to Huntington and Blydenburgh." To make that representation, OneBeacon had to accept "1999" as the claims-made date. If OneBeacon still maintained that the claim had been made in "1998" (the basis of its "late notice" defense), OneBeacon would have been required to take action to tender payment of the fees incurred in the year 1998 -- or else face liability for failing to do so. In addition, OneBeacon's liability for prejudgment interest would have been greater because its principal liability would have been greater. OneBeacon has admitted that its payment decision was motivated by its desire to minimize its liability for "prejudgment interest." Thus, it is no wonder that OneBeacon would prefer a reformation of the Order that would limit Estee Lauder's "discovery" to receiving a conclusory statement from former counsel simply denying an intent to waive. Such facts alone should have precluded the Court from granting OneBeacon's motion to amend.

In reply, OneBeacon argues that Estee Lauder's procedural barrier it seeks to erect is no obstacle. In its underlying reply papers, OneBeacon pointed out that Estee Lauder's position that OneBeacon could not, as a matter of law, amend its Answer because it had withdrawn the defense, was incorrect, and that the only standard for denying a motion to amend is upon a showing of prejudice.

Further, both parties agree that, prior to *Key-Span*, the First Department Decision prevented OneBeacon from pursuing a late-notice defense. Thus, OneBeacon's removal of the Late Notice Defenses cannot have effected a permanent waiver of such defenses under the common law. In a recent and related appellate brief, Estee Lauder argued that the First Department Decision rendered OneBeacon's Late Notice Defenses "futile." And, Estee Lauder's factual inquiries cannot make the First Department Decision--or the rights it removed--"conditional." No one contends that a contractual waiver took place, and this situation is not akin to an "options contract," where a known right exists but cannot by exercised for some time. When a right does not exist at the time of alleged waiver, it cannot be a "known right" as a matter of law, and that, from a common law waiver standpoint, there is nothing to waive.

Discussion

A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision' " (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992] *lv denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

***8** Here, OneBeacon fails to point to any fact or law that the Court overlooked or misconstrued in reaching its determination.

The argument that OneBeacon raises herein was not previously raised. When Estee Lauder asserted that OneBeacon's "post-suit conduct" operated to waive "late notice",[4] and argued that a proposed amendment lacking in merit should be barred regardless of any lack of prejudice, OneBeacon merely addressed the issue of prejudice, argued that the proposed amendment cured any "prior waiver" (Reply Memorandum of Law, dated November 23, 2014, page 3, fn. 2), and distinguished the caselaw cited by Estee Lauder. When referencing Estee Lauder's post-suit waiver contention, OneBeacon explained that because Estee Lauder did not assert any prejudice, the Court need not address the post-suit waiver theory (id. page, 3); the motion to amend was the proper means to cure any post-suit waiver conduct (id., page 3, fn. 2); and OneBeacon did not fail to plead its Late Notice Defenses with particularity (pages, 4-6). OneBeacon clearly had the opportunity to raise the very argument it raises now, *i.e.*, that as a matter of law, its post-suit conduct of withdrawing its Late Notice Defenses could not operate as a waiver as it could only waive a "known right," a right which did not exist at the time the Amended Answer was filed. Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661 [1st Dept 1984]) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588; *Pahl Equip. Corp. v Kassis*, 182 AD2d at 27; *Kent v 534 East 11th Street*, 80 AD3d 106, 912 NYS2d 2 [1st Dept 2010]). That this Court held that the record was insufficient to determine the issue of waiver as a matter of law for purposes of summary judgment is not a basis to raise the new argument.

[4] For example, in its underlying opposition papers, Estee Lauder asserted, "For more than 26 months after the First Department ruled, OneBeacon stood upon, and did not amend or propose to amend, its affirmative defense that Estee Lauder provided notice of the PRP "claims" later than required by contract or law"; "in or before early May 2011, OneBeacon's claims handler, Ed Albanese, determined that the underlying PRP 'claims' were made in '1999' "; "Mr. Albanese further acknowledged that notice of the 1999 "claims" was provided to OneBeacon in mid-May 1999"; "OneBeacon has not come forward with an affidavit from any OneBeacon lawyer involved in amendments eliminating the late notice defense explaining what he or she was thinking at the time he or she withdrew the defense in May 2011, or what he or she was thinking when the late notice defense was maintained for the 26-month period after the First Department ruled that any late notice defense in this case was unsustainable"; "In contrast . . . the record bristles with evidence as to why OneBeacon would have reasonably concluded that *even if the adverse "waiver" law of the case were to be reversed or overruled, in whole or in part, OneBeacon could no longer prevail on its theory that the PRP claims should be deemed to have been "made" in "1998."*; "OneBeacon's admission that the PRP claims were 'made' in 1999 not only explains OneBeacon's voluntary and intentional abandonment of its late notice defense, but it also creates, at minimum, a question of fact that would preclude the grant of summary judgment for OneBeacon even if its late notice defense had not been waived by its pre-suit conduct pursuant to New York's common law and by its post-suit conduct of withdrawing the defense" (Pp. 10-11, 16, 17).

***9** Therefore, reargument is unwarranted.

In any event, even if the Court were to address the merits of the argument that OneBeacon could not have waived its Late Notice Defenses since such Defenses were not available to it, such argument is insufficient to warrant a change in this Court's previous determination.

In this regard, the Court must separate the wheat from the chaff.

OneBeacon's ability to "assert" or "state" the affirmative defense of Late Notice is materially distinct from whether OneBeacon substantively waived the affirmative defense of Late Notice.

The issue of whether OneBeacon may "assert" the affirmative defense of Late Notice was granted by the Court. As this Court previously reasoned, it remains unchallenged that "Estee Lauder failed to sufficiently assert a claim of surprise or prejudice in its preparation of its defense to any Late Notice Defense raised by OneBeacon." (Decision, p. 13). OneBeacon does not now reargue this point on which it prevailed.

However, at issue on this reargument motion, as noticed by OneBeacon, is whether the Court's denial of summary judgment was appropriate. Summary judgment in favor of OneBeacon rests, in part, upon a showing that it did not waive the Late Notice Defenses as a matter of law. OneBeacon now argues that, as a matter of law, it did not waive the Late Notice Defense by its filing of the Amended Answer because the defense (or right to pursue the defense) did not exist at that time.

The Court agrees, that at the time OneBeacon filed its Amended Answer, the Late Notice Defenses had been deemed waived by the First Department; the ability to assert the Late Notice Defenses was not available to OneBeacon at that juncture.

However, that does not mean that OneBeacon, through its interactions with Estee Lauder, had not still "waived" such defense (and abandoned the claim that Estee Lauder's notice was late).

OneBeacon's filing of the Amended Answer *also* came after OneBeacon's claims handler testified (arguably, consistent with the First Department Decision) that the Environmental claims against Estee Lauder were "made" in 1999 and that Estee Lauder provided notice in May 1999. When the First Department, in 2009, held that OneBeacon waived its Late Notice Defense, and ordered OneBeacon to pay Estee Lauder's defense costs related to the Blydenburgh and *Hickey's Carting* claims "promptly," OneBeacon did not pay such defense costs until in April 2012, *after* OneBeacon's claims handler's deposition and right *after* Estee Lauder filed the Third Amended Complaint in March 2012. OneBeacon allegedly paid defense costs as mandated by the First Department using a start date of 1999, *consistent with the testimony of its claims handler*. Therefore, it cannot be said that OneBeacon's withdrawal of its Late Notice Defenses was not waiver of the Late Notice Defenses, and the circumstances merit further discovery of whether OneBeacon intended to abandon the Late Notice Defense, notwithstanding the First Department's Decision. In other words, the Court need not accept at face value OneBeacon's conclusory claim that the sole or actual intent of withdrawing the Late Notice Defenses was due to the First Department Decision.

***10** Therefore, as the present record fails to conclusively establish that OneBeacon waived or did not waive its Late Notice Defenses, the Court adheres to its earlier determination.

Conclusion

Based on the foregoing, it is hereby

ORDERED that OneBeacon's motions for leave to reargue the branch of its motion for summary judgment motion, is denied. And it is further

ORDERED that OneBeacon shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: April 7, 2015

<<signature>>

Hon. Carol Robinson Edmead, J.S.C.

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130 A.D.3d 497, 13 N.Y.S.3d 415, 2015 N.Y. Slip Op. 06030

**1 Estee Lauder Inc., Appellant
v
OneBeacon Insurance Group, LLC, et al., Respondents.

Supreme Court, Appellate Division, First Department, New York
July 9, 2015

CITE TITLE AS: Estee Lauder Inc. v OneBeacon Ins. Group, LLC

HEADNOTE

Insurance
Disclaimer of Coverage

Waiver of Late Notice Defense

Reed Smith LLP, New York (John W. Schryber of counsel), for appellant.
Steptoe & Johnson LLP, New York (Michael C. Miller of counsel), for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered February 10, 2015, which, to the extent appealed from, granted defendants' (OneBeacon) motion for leave to amend their answer to reassert an affirmative defense of late notice, unanimously reversed, on the law, with costs, and the motion denied.

OneBeacon waived its right to assert the affirmative defense of late notice when it failed to raise that ground in its letter of ***498** disclaimer to plaintiff. We made this finding in a prior appeal in this case (62 AD3d 33, 35 [1st Dept 2009]), and it remains law of the case. *KeySpan Gas E. Corp. v Munich Reins. Am., Inc.* (23 NY3d 583 [2014]) does not alter this result. There, the Court of Appeals stated that "*[t]o the extent Estee Lauder Inc. v OneBeacon Ins. Group, LLC* (62 AD3d 33 [1st Dept 2009]) . . . and other Appellate Division cases hold that Insurance Law § 3420 (d) (2) applies to claims not based on death and bodily injury, those cases were wrongly decided and should not be followed" (*id.* at 590 n 2 [citations omitted and emphasis added]). Our case did not so hold. The opinion states at the outset that "[t]he resolution of this appeal turns on whether OneBeacon waived its right to disclaim coverage on the ground that plaintiff failed to give it timely notice of certain claims against plaintiff" (62 AD3d at 34). It then finds that "[n]either in the July 24 nor the November 1 letter [rejecting plaintiff's claims] did OneBeacon ever assert that Lauder had failed to give timely notice of a claim or occurrence, let alone disclaim coverage on the ground of such a failure by Lauder" (*id.*). It notes that under New York law, "an insurer is deemed, as a matter of law, to have intended to waive a defense to coverage where other defenses are asserted" and the insurer knows of "the circumstances relating to its defense of untimely notice" (*id.* at 35), and states that OneBeacon did not dispute that it had such knowledge long before it sent the 2002 letters (*id.* at 36). Thus, in a matter involving property damage claims, we relied on the common law for the proposition that "[a] ground not raised in the letter of disclaimer may not later be asserted as an affirmative defense" (*Benjamin Shapiro Realty Co. v Agricultural Ins. Co.*, 287 AD2d 389, 389 [1st Dept 2001]). Concur—Friedman, J.P., Andrias, Saxe, Richter and Gishe, JJ.

2016 WL 4792170

THIS DECISION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS.

Court of Appeals of New York.

ESTEE LAUDER INC., Respondent,
v.
ONEBEACON INSURANCE GROUP, LLC, et al., Appellants.

Sept. 15, 2016.

Attorneys and Law Firms

Submitted by Harry Lee, for appellants.

Submitted by John W. Schryber, for respondent.

Century Indemnity Company, amicus curiae.

MEMORANDUM:

The order of the Appellate Division should be reversed, with costs, the order of Supreme Court reinstated, and the certified question answered in the negative.

Analyzing the circumstances under the common-law waiver standard, which requires an examination of all factors, defendants cannot be said to have waived their right to assert the late-notice defense as a matter of law by failing to specifically identify late notice in their disclaimer letters. Defendants identified the late-notice defense in early communications with plaintiff before relying on a reservation of rights in two disclaimer letters. "[U]nder common-law principles, triable issues of fact exist whether defendants clearly manifested an intent to abandon their late-notice defense" (*Keyspan Gas E. Corp. v. Munich Reins. Am., Inc.,* 23 NY3d 583, 591 [2014]). Accordingly, Supreme Court properly granted defendants' motion for leave to amend their answer to reassert the affirmative defense of late notice.

On review of submissions pursuant to section 500.11 of the Rules (22 NYCRR 500.11), order reversed, with costs, order of Supreme Court, New York County, reinstated, and certified question answered in the negative, in a memorandum.

Chief Judge DiFIORE and Judges PIGOTT, RIVERA, ABDUS–SALAAM, STEIN, FAHEY and GARCIA concur.

All Citations

--- N.E.3d ----, 2016 WL 4792170, 2016 N.Y. Slip Op. 06012

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