SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ENGORON **PART** 37

Justice

Index Number : 154143/2012
GREATER NEW YORK MUTUAL INS. CO.
vs.
ADMIRAL INDEMNITY COMPANY
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 1/14/2015
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 2/23/15

HON. ARTHUR F. ENGORON, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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GREATER NEW YORK MUTUAL INSURANCE COMPANY, 50 SUTTON PLACE SOUTH OWNERS, INC. and BROWN HARRIS STEVENS RESIDENTIAL MANAGEMENT, LLC,

Plaintiffs,

- against -

ADMIRAL INDEMNITY COMPANY,

Defendant.

----------x

Index Number: 154143/2012

Sequence Numbers: 001, 002

Decision and Order

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers were used on plaintiffs' motion for summary judgment and defendant's motion for summary judgment:

Papers Numbered:

Plaintiffs: Notice of Motion - Affirmation - Affidavits - Exhibits 1
Defendant: Notice of Motion - Affirmation - Affidavit - Exhibits 2
Reply Affirmation in Further Support of Plaintiffs' Motion and In Opposition to Defendant's Motion 3
Reply Affirmation in Further Support of Defendant's Motion 4

Upon the foregoing papers, plaintiffs' motion is granted in part and defendant's motion is denied.

Background

This case is a relatively straightforward insurance coverage dispute between plaintiff Greater New York Mutual Insurance Company ("GNY") and defendant Admiral Indemnity Company ("Admiral") as to which insurer must defend and indemnify plaintiffs 50 Sutton Place South Owners, Inc. ("50 Sutton") and Brown Harris Stevens ("BHS"), the owner and managing agent, respectively, of the luxury cooperative building located at 50 Sutton Place South, New York, New York (the "Building"), in the action brought in October of 2009 by apartment owner Joanne Payson for water damages and mold caused by leaks in the Building's roof and exterior walls (Payson v 50 Sutton Place Owners, Inc., Index No. 114357/2009 [the "Payson Action"]).

Admiral disclaimed coverage to 50 Sutton and BHS for several reasons, the two main grounds being that: (1) the water leaks and damages occurred, and the insureds had notice of such leaks and damages, prior to the inception of Admiral's commercial general liability ("cgl") policies on February 1, 2007, and any damages subsequent to February 1, 2007 were a "mere continuation of the original problem"; and (2) coverage is barred under the "expected or intended injury"

exclusion of Admiral's cgl policies because the Payson complaint alleges intentional conduct and not an accidental occurrence. GNY, which insured 50 Sutton and BHS from January 15, 2004 to February 1, 2007, has been defending 50 Sutton and BHS in the Payson Action under a reservation of rights.

In June of 2012, GNY commenced the instant action for a judgment declaring that Admiral is obligated to defend and indemnify 50 Sutton and BHS and to reimburse GNY for the defense costs it incurred in the Payson Action. Admiral, in its answer, admitted that it insured 50 Sutton and BHS during the period from February 1, 2007 to February 1, 2009 and that it disclaimed coverage to 50 Sutton and BHS for the Payson Action, and asserted twenty-five separate affirmative defenses, the pertinent ones of which are iterations of the two main grounds set forth in Admiral's disclaimer letters, i.e., coverage is precluded by the "known loss" rule and the "expected or intended injury" policy exclusion.

GNY and Admiral now each move, separately, for summary judgment. Their collective submissions, including, inter alia, the pleadings, the cgl insurance policies, Admiral's disclaimer letters, and an affidavit of Admiral's claims examiner regarding its investigation, establish the following pertinent facts.

The CGL Insurance Policies

During the period from 2004 through the present, GNY and Admiral, separately and consecutively, have provided cgl insurance coverage to 50 Sutton and BHS as follows:

- January 15, 2004 to February 1, 2007: GNY (under policy number 1131L00000) (GNY Moving Papers, Exhibit "I");
- February 1, 2007 to February 1, 2008: Admiral (under policy number 21-2-1060-31) (Admiral Moving Papers, Exhibit "B");
- February 1, 2008 to February 1, 2009: Admiral (under policy number 220-31-09) (Id.); and
- February 1, 2009 to the present: GNY (under policy number 1131M15776).

GNY and Admiral provided 50 Sutton and BHS with identical cgl coverage for "bodily injury" and "property damage." GNY's first policy and both of Admiral's policies each contain Insurance Service Office form "CG 01 63 09 99," which provides, in pertinent part:

SECTION I - COVERAGES
COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY
1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. **We will have the right and duty to defend the insured against any "suit" seeking those damages even if the allegations of the "suit" are groundless, false or fraudulent.** However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply [emphasis added] ...

b. This insurance applies to "bodily injury" and "property damage" **only if**:

(1) [it] is caused by an "occurrence" that takes place in the "coverage territory";
(2) [it] occurs during the policy period; and
(3) **Prior to the policy period, no insured ... knew that the "bodily injury" or "property damage" had occurred, in whole or in part.** If such ... insured ... knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period [emphasis added].

d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured ...
(2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or
(3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

Additionally, although not on the same coverage forms, the GNY and Admiral policies each exclude from coverage (i.e., "the insurance does not apply to"):

a. **Expected or Intended Injury**
"Bodily injury" or "property damage" expected or intended from the standpoint of the insured ...

Insurance coverage under GNY's first policy (1/15/04-2/1/07) and Admiral's second policy (2/1/08-2/1/09) is **primary** for 50 Sutton and BHS. Those insurance policies contain the same "Other Insurance" provision, which makes the coverage primary for "property damage" and "bodily injury" losses except under certain specified exceptions, irrelevant here. The provision also provides that if there is other primary insurance for a loss, and if the other insurance "permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first ..."

By contrast, the first Admiral policy (2/1/07-2/1/08), contains an endorsement which makes Admiral's coverage excess over "any other policy by which another insurer has a duty to defend a 'suit' for which this insurance may also apply." The endorsement further provides that when Admiral's insurance is "excess" it has "no duty under Coverage A ... to defend the insured against any 'suit' if any other insurer has a duty to defend the insured against that 'suit.'"

Admiral's Pre-Suit Investigation of the Payson Damages and Disclaimers of Coverage
In 2007, after the inception of Admiral's first cgl policy, Admiral received notice of mold and water damage in the Payson apartment, prompting it to conduct an investigation (Admiral Moving Papers, Affidavit of Robert Buchert, sworn to on December 8, 2014 ["Buchert Aff."], ¶¶ 6-7). According to Mr. Buchert, Admiral's investigation revealed that: 50 Sutton and BHS became aware of the mold condition and water damage in the Payson apartment in 2006 (Id., ¶¶8,

10, 12); inspections by 50 Sutton and its roofing contractor in 2006 and 2007 uncovered leaks in the roof which caused the water damage in the Payson apartment (Id.. ¶¶9, 10, 11); and 50 Sutton scheduled an entire roof replacement to commence in August 2007 (Id., ¶¶17). The investigation also revealed that, in January of 2007, Payson's attorneys sent 50 Sutton and BHS a letter stating that work to repair the roof leaks had not begun, and enclosing a "draft" summons and complaint from Payson's attorneys alleging causes of action for breach of contract and breach of warranty of habitability (Id., ¶¶13, 14).

By letter dated February 5, 2008, Admiral disclaimed coverage to 50 Sutton and BHS under its first cgl policy (2/1/07-2/1/08) for the "draft" Payson complaint upon the grounds that, inter alia, the draft complaint alleges: matters occurring prior to the policy period of which 50 Sutton and BHS had knowledge, and matters which are "willful and intentional" with "resulting damages that are expected or intended" (Admiral Moving Papers, Exhibit "D"). On September 14, 2009, Admiral disclaimed coverage for the "draft" Payson complaint under its second cgl policy (2/1/08-2/1/09) for the same reasons set forth in the February 5, 2008 disclaimer letter (Id.).

The Payson Action

The complaint in the Payson Action (GNY Moving Papers, Exhibit "A," Complaint) alleges, in pertinent part, that: there have been "continuous leaks in the apartment which has caused severe toxic mold contamination and infestations as well as water damage" from 2006 through 2008 (Complaint, ¶1); an October 18, 2006 "Indoor Air Quality Investigation" of plaintiff Payson's apartment revealed excessive moisture in the walls, obvious water damage, visible fungal growth in a bedroom and the library (Id., ¶12); Payson notified 50 Sutton and BHS of the "Indoor Air Quality Investigation" and asked them to remedy the leaks and mold damage (Id., ¶13); 50 Sutton and BHS refused to acknowledge the mold condition and delayed taking any action (Id., ¶¶14, 16); the "continuing and ongoing leaks and the resulting toxic mold infestation were reconfirmed" by professionals in October 2007 (Id., ¶¶17-19); 50 Sutton and BHS completed repairs to the roof in May 2008 (Id., ¶¶2, 15); Payson's mold remediation specialist performed remediation in the apartment in September 2008 (Id., ¶¶20, 21); thereafter Payson's forensic engineer discovered that 50 Sutton and BHS "failed to fix all of the leaks and there was extensive, ongoing water penetration through the exterior walls" (Id., ¶22); water testing performed in December 2008 by 50 Sutton and BHS' engineer revealed leaks in the exterior walls of the Building (Id., ¶¶23-27); and 50 Sutton and BHS commenced repairs on the exterior walls of the Building in the summer of 2009 (Id., ¶¶2, 28). The Payson complaint alleges that the leaks and damages have been continuous since 2006 and casts the conduct of 50 Sutton and BHS's as intentional, alleging throughout that 50 Sutton and BHS acted "willfully and wantonly," "consistently refused to take any action to remediate this hazardous situation" (Id., ¶1, 32), and that their "willful, wanton and egregious conduct [] made the Apartment uninhabitable and jeopardized Plaintiff's health and emotional well-being (Id., ¶3, 32).

Upon the foregoing factual allegations, plaintiff Payson asserted seven separate causes of action, in the following order: (1) breach of contract (Proprietary Lease); (2) breach of warranty of habitability; (3) constructive eviction; (4) negligence; (5) emotional distress and pain and suffering; (6) injunctive relief (order defendants to prevent water damage, remediate mold and abate maintenance payments); and (7) declaratory judgment (plaintiff not required to make maintenance payments) (Id., ¶¶ 33-65).

Admiral's November 3, 2009 Disclaimer

By letter dated November 3, 2009, following its receipt of the complaint in the Payson Action, Admiral again disclaimed coverage to 50 Sutton and BHS for the Payson Action under both of its cgl policies, based upon the same grounds as set forth in the February 5, 2008 and September 14, 2009 disclaimer letters (Admiral Papers, Exhibit "F"). In pertinent part, the November 3, 2009 disclaimer states:

> ...Admiral has already disclaimed coverage for this matter, under cover letters dated **February 5, 2008** and **September 14, 2009.** ... The disclaimers were based upon the finding of Admiral's investigation into this matter which disclosed, among other things, that the water problems affecting the plaintiff's apartment date back to 2005 and that as early as 2006 the building had been contacted by Ms. Payson's lawyer about the problem ...
>
> ... While the Complaint goes on to allege damage that continued into the Admiral policy periods, all of this damage was a mere continuation of the original problem and your claimed failure to rectify the conditions. There is no suggestion in the Payson Complaint that any kind of new and/or different damage commenced during either Admiral policy period ...
>
> ... the plaintiff's allegations of willfulness, wantonness and egregiousness in allegedly refusing to make the necessary repairs, compel the conclusion that assuming the truth of the allegations, as Admiral must do, you could and should have expected the damage to occur ...
>
> ... In addition to the foregoing, Admiral's obligations are also limited to the extent set forth in its policy's Other Insurance clause...

The Instant Summary Judgment Motions

In support of its instant motion for summary judgment, GNY argues that: (1) examining the "four corners" of the Payson complaint, it alleges facts – specifically, negligent failure to maintain the Building's roof and exterior walls – which bring Ms. Payson's claims within the coverage afforded to 50 Sutton and BHS under Admiral's cgl policies; (2) the "known loss" rule does not preclude coverage because there are issues of fact as to whether the conditions which caused the 2006 leaks and damages were the same conditions which caused the 2008 leaks and damages; (3) the "expected or intended injury" exclusion does not apply because such exclusion "applies in situations where the harm caused is inherent in the nature of the acts allegedly committed"; and (4) because Admiral "cannot demonstrate" that the allegations in the Payson complaint "cast that pleading solely and entirely within the policy exclusions," Admiral must defend 50 Sutton and BHS in the Payson Action and reimburse GNY for defense costs which it incurred in defending the insureds therein.

In support of its motion and in opposition to GNY's motion, Admiral argues that it properly disclaimed coverage to 50 Sutton and BHS because: (1) the damages alleged in the Payson complaint are a "continuation" of damages known to have commenced prior to February 1, 2007, and therefore barred under the terms of Admiral's policies and the "known loss" rule; (2) the Payson complaint alleges "exclusively intentional, willful, and knowing conduct" and therefore "expected or intended" injuries, which are excluded under Admiral's policies; (3) even if Admiral's policies afford coverage, such coverage is on an excess basis; and (4) GNY's motion must be denied for failure to provide discovery.

Discussion

It is has long been well-settled that an insurer's duty to defend is broader than its duty to indemnify. See International Paper Co. v Continental Cas. Co., 35 NY2d 322, 326-327 (1974). As aptly summarized by the Court of Appeals in Automobile Ins. Co. of Hartford v Cook, 7 NY3d 131, 137 (2006), this legal maxim

> ... is "exceedingly broad" and an insurer will be called upon to provide a defense whenever the allegations of the complaint "suggest . . . a reasonable possibility of coverage" (*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 648 [1993]). "If, liberally construed, the claim is within the embrace of the policy, the insurer must come forward to defend its insured no matter how groundless, false or baseless the suit may be" (*Ruder & Finn v Seaboard Sur. Co.*, 52 NY2d 663, 670 [1981]).
>
> The duty remains "even though facts outside the four corners of [the] pleadings indicate that the claim may be meritless or not covered" (*Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 63 [1991]). For this reason, when a policy represents that it will provide the insured with a defense, we have said that it actually constitutes "litigation insurance" in addition to liability coverage (*see Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 310 [1984], quoting *International Paper Co. v Continental Cas. Co.*, 35 NY2d 322, 326 [1974]). Thus, an insurer may be required to defend under the contract even though it may not be required to pay once the litigation has run its course.

As liberally construed, the complaint in the Payson Action sufficiently pleads facts triggering Admiral's duty to defend its insureds, 50 Sutton and BHS, for "property damage" and "bodily injury" sustained by Ms. Payson as a result of water damages and mold in her apartment. The allegation in the Payson complaint that Ms. Payson "notified" 50 Sutton and BHS, at some unspecified time, about the October 18, 2006 Criterion Lab Report finding water damages and mold in the apartment (GNY Moving Papers, Exhibit "A," Complaint, ¶13) merely raise a question of fact as to whether 50 Sutton and BHS actually knew or "became aware of" such damages prior to February 1, 2007. In their answer in the Payson Action, 50 Sutton and BHS specifically denied the allegations of notice in the Payson complaint (GNY Moving Papers, Exhibit "D," Answers). And, because it could be ultimately shown that 50 Sutton and BHS did

not actually have notice of Ms. Payson's damages or the conditions that caused them prior to February 1, 2007, the Payson complaint, on its face, suggests a reasonable possibility of coverage. See Fitzpatrick v American Honda Motor Co., Inc., 78 NY2d 61, 66 (1991) ("an insurer's duty to defend is at least broad enough to apply when the "four corners of the complaint" suggest the reasonable possibility of coverage.").

However, Admiral has met its burden of establishing, by competent proof in the form of Mr. Buchert's affidavit, that, as of 2006, 50 Sutton and BHS had notice of leaks in the Building's roof which caused water damages and mold in the Payson apartment, thereby taking Ms. Payson's claim for damages caused by the roof leaks outside of the coverage afforded under Admiral's first policy (2/1/07-2/1/08). Neither 50 Sutton nor BHS refuted any part of Mr. Buchert's sworn statement, based upon Admiral's investigation, that 50 Sutton: knew of the water damage and mold condition in Ms. Payson's apartment as early as September 2006; inspected the Building's roof with its engineer and roofing contractor in September/ October 2006, during which water and moisture was found; and received a letter from Ms. Payson's attorneys in January of 2007 requesting that the roof be repaired. Thus, because 50 Sutton "became aware of" the roof leaks and received a written claim for damages prior to inception of Admiral's first policy on February 1, 2007, insurance under that policy does not apply to Ms. Payson's damages which are caused by leaks in the Building's roof.

Admiral is obligated to defend 50 Sutton and BHS in the Payson Action under its second cgl policy (2/1/08-2/1/09) for damages caused by leaks **after** the Building's roof was repaired. The Payson complaint specifically alleges that 50 Sutton and BHS completed the Building's roof repairs in May of 2008, and that in September of 2008, following the repairs and mold remediation in the Payson apartment, cracks and holes were found in the Building's exterior walls through which water was "infiltrating." Therefore, as liberally construed, the Payson complaint alleges "new and discrete incidents" of water leaks and damages that were caused by a "new condition" of cracks and holes in the Building's exterior walls occurring within Admiral's second cgl policy period (2/1/08-2/1/09), and not a mere "continuation" of damages caused by the faulty roof. See Atlantic Mutual Ins. Co. v Greater New York Mutual Ins. Co., 2009 NY Misc. Lexis 4036 (Supreme Court, New York County 2009) (mold produced after 2003 remediation "was not a continuation of the mold condition from 2003, but was a new condition arising from several new and discrete incidents of water infiltration occurring within the policy period").

Although the Payson complaint alleges that leaks in the Building's exterior walls were "extensive and ongoing," it does not allege that such leaks existed prior to May 2008. Under these circumstances, there is a "reasonable possibility" of coverage for 50 Sutton and BHS in the Payson Action for damages caused by cracks and holes in the Building's exterior walls under Admiral's second cgl policy. Automobile Ins. Co. of Hartford v Cook, supra, 7 NY3d 137. Indeed, Admiral must defend 50 Sutton and BHS in the Payson Action **even if** it is ultimately shown that the cracks and holes in the Building's exterior walls existed, and the insureds had notice of such conditions, prior to February 1, 2008. See Fitzpatrick v American Honda Motor Co., Inc., 78 NY2d at 65 ("...an insurer may be contractually bound to defend even though it may not ultimately be bound to pay, either because its insured is not factually or legally liable or because the occurrence is later proven to be outside the policy's coverage."); International Paper

Co. v Continental Cas. Co., supra, 35 NY2d at 327 (where complaint pleads facts "which bring the injury within coverage," insurer must "defend irrespective of the insured's ultimate liability."). Admiral has not established on the instant motion that, prior to February 1, 2008, 50 Sutton or BHS had notice of damages caused by cracks and holes in the Building's exterior walls.

Additionally, the "expected or intended injury" policy exclusion does not apply to bar coverage for 50 Sutton and BHS. Although the Payson complaint is peppered through with allegations that 50 Sutton and BHS "willfully, wantonly" and "egregiously" failed to maintain and repair the Building's roof and exterior walls (i.e., that they acted "intentionally"), the fourth cause of action specifically alleges negligence, which "implies an unintentional or unexpected event" (see Automobile Ins. Co. of Hartford v Cook, supra, 7 NY3d 138), for which Admiral's policies provide coverage. The negligence cause of action defeats any argument by Admiral that the allegations of the Payson complaint fit exclusively within the policy exclusion for "expected or intended injury." See Automobile Ins. Co. of Hartford v Cook, supra, 7 NY3d 138 ("When an insurer seeks to disclaim coverage on the further basis of an exclusion, as it does here, the insurer will be required to "provide a defense unless it can 'demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, *in toto*, are subject to no other interpretation'"; complaint alleging negligence can not be found to fall within expected or intended injury exclusion).

In any event, the question of whether 50 Sutton and BHS acted negligently or intentionally is to be determined by the trier of fact in the Payson Action. It is enough that the Payson complaint alleges negligence to trigger coverage under Admiral's policy. See Fitzpatrick v American Honda Motor Co., Inc., supra; International Paper Co. v Continental Cas. Co., supra, 35 NY2d at 325 (negligence complaint "subject to defeat because of debatable theories expressed therein or because of an untenable theory, must be defended by the insured. The natural and reasonable meaning of the terms of the [insurance] policy leaves no doubt that the [insurer] agreed to undertake the defense of such suit as was brought against its insured."); see also Automobile Ins. Co. of Hartford v Cook, supra (Court of Appeals held that "expected or intended injury" exclusion does not bar coverage for insured who, although he intentionally shot someone, did not intend to kill the person, where complaint alleged negligence).

The cases upon which Admiral relies to support its argument that the Payson complaint fits within the "expected or intended injury" policy exclusion because 50 Sutton and BHS could have anticipated that their alleged "willful" and "wanton" failure to make repairs would cause damage to Ms. Payson, are inapposite. Town of Moreau v Orkin Exterminating Co., Inc., 165 AD2d 415, 417 (3rd Dep't 1991) (no accidental occurrence where insured criminally convicted of "knowingly dumping hazardous wastes," which conviction "precluded defendants from contending that the burial of pesticides was unintentional"); Tranchina v Government Employees Ins. Co., 235 AD2d 471, 472 (2nd Dep't 1997) (underlying complaint sounding in intentional tort "specifically, the intentional infliction of emotional distress and prima facie tort" fell within expected or intended injury exclusion); Home Mut. Ins. Co. v Lapi, 192 AD2d 927, 928 -929 (1993) (expected or intended injury policy exclusion barred coverage for insured who was criminally convicted of assault and admitted in open court "that he did 'commit the offense ... with intent to cause serious physical injury'"); John Hancock Property and Cas. Ins. Co. v Warmuth, 205 AD2d 587,

588 (2nd Dep't 1994) (insured "pleaded guilty to attempted manslaughter in the first degree, an essential element of which is the intent to injure another (see, Penal Law § 125.20), thus falling squarely within the exclusionary clause of the policy"). Here, the Payson complaint does not sound solely in intentional tort, but contains allegations of negligence, and neither 50 Sutton nor BHS have been convicted of any crimes that contain the essential element of intent to do harm.

Because, as shown above, Admiral's duty to defend its insureds in the Payson Action arises from the "four corners" of the Payson complaint and not matters outside thereof, the absence of discovery as to "precisely when" 50 Sutton and BHS had notice of the "problems causing damage" in the Payson apartment does not preclude summary judgment in favor of GNY. See Atlantic Mutual Ins. Co. v Greater New York Mutual Ins. Co., supra.

Finally, by its own terms, Admiral's second cgl policy for the period from February 1, 2008 to February 1, 2009 provides 50 Sutton and BHS with **primary** coverage for losses within that policy period. Admiral's second policy does not contain the "Other Insurance" endorsement (as does its first cgl policy) which makes its coverage "excess" to "any other policy by which another insurer has a duty to defend a 'suit' for which this insurance may also apply." Therefore, because the "Other Insurance" provisions in Admiral and GNY's policies are identical, both Admiral and GNY are primary insurers for the Payson Action, and must contribute to the defense of 50 Sutton and BHS in "equal shares."

The Court has considered the parties' other arguments and finds them to be without merit.

Conclusion

The motion by Greater New York Mutual Insurance Company is granted in part, and the motion by Admiral Indemnity Company is denied. The clerk is directed to enter judgment declaring that Admiral Indemnity Company is obligated to defend 50 Sutton Place South Owners, Inc. and Brown Harris Stevens in the underlying action Payson v 50 Sutton Place South Owners, Inc., Index No. 114357/2009, and to reimburse Greater New York Mutual Insurance Company for its proportionate one-half share of defense costs incurred thus far and to be incurred by Greater New York Mutual Insurance Company therein.

Dated: February 23, 2015

Arthur F. Engoron, J.S.C.