**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

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DANIEL PEPPER,

Plaintiff,

- against -

GEICO INDEMNITY INSURANCE COMPANY AND/OR GEICO INDEMNITY COMPANY,

Defendants.

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TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 15893/09
Motion Seq. No.: 01
Motion Date: 02/26/10
**XXX**

**The following papers have been read on this motion:**

| | Papers Numbered |
|---|---|
| Notice of Motion, Affidavit. Affirmations and Exhibits | 1 |
| Affidavit in Opposition and Exhibits | 2 |
| Reply Affirmation | 3 |

Motion for summary judgment pursuant to CPLR 3212 and Insurance Law § 3420 by the plaintiff, Daniel Pepper ("Pepper"), is granted.

In April of 2008, plaintiff was riding a bicycle on Vanderbuilt Avenue in Brooklyn, New York, when a car operated by Yolanda Johnson ("Johnson"), a named defendant in a pending Kings County matter, swerved towards him allegedly causing him to fall from his bicycle and sustain personal injuries. *See* Pepper Aff., at 1.

In mid-April 2008, Pepper's counsel, both verbally and in writing, notified Johnson's no-fault insurer, defendants Geico Indemnity Insurance Company and/or Geico Indemnity

Company (collectively "Geico") that the accident had occurred. *See* Herman Aff., 1-2.

In response, Geico claims examiner Frances Moran ("Moran") opened a claims file on April 18, 2008 when plaintiff's counsel advised Geico that the accident had occurred. *See* Moran Aff., ¶¶ 2-3. Since no police report had been filed, Geico attempted to contact Johnson to secure confirmatory details about the accident. *See* Moran Aff., ¶¶ 3-4. Moran called Johnson at work on April 21, 2008, around mid-day, and was told that Johnson was out in the field. Moran then left a message about the claim together with her return phone number. *See* Moran Aff., ¶¶ 4-5; Neuman Aff., 2-3. When no response was forthcoming, Moran called Johnson's cell phone and home phone on April 22, 2008 and left messages advising Johnson that it was very important that Johnson call her back so they could discuss the alleged accident. *See*Moran Aff., ¶¶ 6-7. That same day, April 22, 2008, Moran sent a so-called contact letter to Johnson at her home address. The letter, which has not been attached to Geico's motion papers, advised that Geico was attempting to locate Johnson and requested that she call Moran at the number listed in the letter. *See* Moran Aff., ¶¶ 7-8; Defendants' Exhibit E.

Since Johnson did not respond to either Moran's calls or her contact letter, on April 24, 2008, Moran requested that Geico field investigator Quinton Blakes ("Blakes") attempt to contact Johnson. *See* Blakes Aff., ¶¶ 2-4. After confirming the accuracy of the address and telephone numbers on file for Johnson, on April 29, 2008, Blakes called Johnson's work number and left a message with a co-worker asking that Johnson return his call. *See* Blakes Aff.,¶¶ 5-7.

On April 30, 2008, the next day, Johnson returned Blakes' call and asked that Blakes call her cell phone. When Blakes returned her call, Johnson told him, however, that she could

not take calls at that time since she was "in the field" during work hours. *See* Blakes Aff.,¶¶ 3-5. Blakes called Johnson later that night and left a voice message about the claim requesting that she return his call. *See* Blakes Aff.,¶¶ 5-7. On May 6, 2008, Johnson returned Blakes' call, leaving a voice mail, in response to which Blakes called her back on May 7, 2008 and left a message requesting a return call. *See* Blakes Aff.,¶¶ 7-8.

On May 11, 2008, Blakes called Johnson and she answered the call, but after Blakes identified himself as a Geico employee, Johnson claimed that she could not hear or understand him properly. *See* Blakes Aff.,¶¶ 8-9. Blakes immediately called her back and informed Johnson that it was her obligation as a policy holder to cooperate with Geico's investigation and that she should call him back. *See* Blakes Aff.,¶ 8.

On May 12, 2008, Blakes received a call from a person who identified herself as a friend of Johnson's named "Angela." *See* Blakes Aff.,¶ 8. During the conversation, Angela informed Blakes that she was then attempting to set up a three-way conference call with Johnson. Angela was apparently unable to complete the process and Blakes was unable to speak to Johnson that day. Angela advised Blakes that she would attempt to contact Johnson and have Johnson call Blakes. *See* Blakes Aff., ¶¶ 9-10.

Blakes called Angela once again and also called Johnson two times, both on May 13, 2008. *See* Blakes Aff., ¶¶ 9-10. He left a message with Angela inquiring as to whether she had spoken to Johnson and also left a message with Johnson requesting that she return his call, but Johnson did not respond to his requests. *See* Blakes Aff.,¶¶ 10-11.

Moran also called Johnson on May 13, 2008 and informed her that if she did not respond, Geico would then disclaim coverage under the policy and all legal bills would

thereafter become her personal responsibility. *See* Moran Aff., ¶¶ 11-12.

On May 20, 2008, Moran sent a reservation of rights letter to Johnson at her home address, which letter stated, *inter alia*, that "[w]e are making this reservation of rights because you have failed to cooperate in the investigation of this claim * * *." *See* Defendants' Exhibit G.

When no response was received to the May 20, 2008 letter, Geico disclaimed coverage by letter dated July 11, 2008. *See* Defendants' Exhibit F. The disclaimer letter advised, *inter alia*, that "[t]his disclaimer is made because of your failure to notify us of this loss and your failure to cooperate with GEICO * * * in the investigation and subsequent handling of the loss." *See* Defendants' Exhibit F. The letter further stated that "[w]e have made many attempts to verify this loss with you * * * [but that] [t]o date we have had no response from you and therefore we are disclaiming coverage for this loss." *See* Defendants' Exhibit F.

Thereafter, in September, 2008, the plaintiff herein, Pepper, commenced an action against Johnson in the Supreme Court, Kings County. Johnson defaulted, and a damages inquest was conducted. *See* Plaintiff's Exhibit 6. A default judgment was subsequently entered against Johnson on June 9, 2009 in the principal sum of $500,000.00. *See* Plaintiff's Exhibit 11; Herman Aff., 1-2.

Plaintiff's counsel wrote to Geico, informing it that its insured had defaulted and that the judgment has been entered against her. In response, Geico acknowledged that the default judgment had been entered, but noted that it had previously disclaimed coverage as to claim in July of 2008.

By summons and complaint dated August 2009, plaintiff commenced the within direct action as against Geico, demanding that Geico satisfy the outstanding judgment pursuant to

Insurance Law § 3420. *See* Plaintiff's Exhibit 8.

Geico has answered and denied the material allegations of the complaint. Plaintiff now moves for summary judgment as against Geico pursuant to Insurance Law § 3420. *See generally Lang v. Hanover Ins. Co.*, 3 N.Y.3d 350, 787 N.Y.S.2d 211(2004).

In opposition to the motion, Geico contends, *inter alia*, that its disclaimer was timely and in all respects proper and that the Court should search the record and dismiss the plaintiff's complaint.

"To deny coverage based upon a failure to cooperate, an insurer bears the 'heavy burden' of demonstrating: '(1) that it acted diligently in seeking to bring about the insured's cooperation, (2) that the efforts employed by the carrier were reasonably calculated to obtain the insured's cooperation, and (3) that the attitude of the insured, after his cooperation was sought, was one of willful and avowed obstruction.'" *Johnson v. GEICO*, 72 A.D.3d 900, 898 N.Y.S.2d 526 (2d Dept. 2010), *quoting Baghaloo-White v. Allstate Ins. Co.*, 270 A.D.2d 296, 704 N.Y.S.2d 131 (2d Dept. 2000). *See also Continental Cas. Co. v. Stradford,* 11 N.Y.3d 443, 871 N.Y.S.2d 607 (2008); *Thrasher v. United States Liability Ins. Co.*, 19 N.Y.2d 159, 278 N.Y.S.2d 793 (1967); *AutoOne Ins. Co. v. Hutchinson*, 71 A.D.3d 1011, 898 N.Y.S.2d 161 (2d Dept. 2010): Insurance Law § 3420.

Significantly, where a carrier disclaims coverage and declines to defend in an underlying lawsuit, "it takes the risk that the injured party will obtain a judgment against the purported insured and then seek payment pursuant to Insurance Law § 3420." *See Lang v. Hanover Ins. Co.*, *supra* at 356; *Bowker v. NVR, Inc.*, 39 A.D.3d 1162, 834 N.Y.S.2d 798 (4th Dept. 2007). Moreover, "[u]nder those circumstances, having chosen not to participate in the underlying lawsuit, the insurance carrier may litigate only the validity of its disclaimer and cannot challenge

the liability or damages determination underlying the judgment." *See Lang v. Hanover Ins. Co.*, *supra.*

With these principles in mind, the Court agrees that the plaintiff has demonstrated its *prima facie* entitlement to judgment as a matter of law. In opposition to the motion, Geico has failed to sustain its burden of demonstrating the existence of a triable issue of fact as to whether Johnson's alleged "failure to cooperate amounted to willful and avowed obstruction." *See New York State Ins. Fund v. Merchants Ins. Co. of New Hampshire*, 5 A.D.3d 449, 773 N.Y.S.2d 431 (2d Dept. 2004).

More particularly, while Geico made efforts to contact Johnson (exclusively through a series of telephone calls and a contact letter), the evidence does not establish, or generate a triable issue of act with respect to, "the third prong of the *Thrasher* test"; namely, that Johnson's attitude was "one of willful and avowed obstruction." *See Thrasher v. United States Liability Ins. Co.*, *supra* at 168; *Country-Wide Ins. Co. v. Henderson,* 50 A.D.3d 789, 856 N.Y.S.2d 184 (2d Dept. 2008). *See also Empire Mutual Ins. Co. v. Stroud,* 36 N.Y.2d 719, 367 N.Y.S.2d 972 (1975).

Although Johnson did not return the majority of the calls made to her, she did make return calls on two occasions and spoke personally to Blakes on a third occasion. Moreover, and even as recounted by Geico's own affiants, there was nothing in the content of Blakes' conversation with Johnson – or the two phone messages she left for him – evincing a willful or avowedly obstructionist attitude toward Geico's inquiries.

Although upon these facts, Johnson's conduct may perhaps qualify as evincing an attitude of "inaction," "mere efforts by the insurer and mere inaction on the part of the insured, without more, are insufficient to establish non-cooperation as 'the inference of non-co-operation

must be practically compelling.'" *See Country-Wide Ins. Co. v. Henderson, supra* at 790, *quoting Empire Mutual Ins. Co. v. Stroud, supra* at 721. *See also State Farm Mut. Auto. Ins. Co. v. Campbell*, 44 A.D.3d 1059, 845 N.Y.S.2d 88 (2d Dept. 2007); *Eagle Ins. Co. v. Sanchez*, 23 A.D.3d 655, 805 N.Y.S.2d 103 (2d Dept. 2005); *Preferred Mut. Ins. Co. v. SAV Carpentry, Inc.*, 44 A.D.3d 921, 844 N.Y.S.2d 363 (2d Dept. 2007); *New York Cent. Mut. Fire Ins. Co. v. Bresil*, 7 A.D.3d 716, 777 N.Y.S.2d 174 (2d Dept. 2004); *New York State Ins. Fund v. Merchants Ins. Co. of New Hampshire, supra* at 451. Here, the evidence submitted does not raise a "practically compelling" inference of non-cooperation.

Alternatively, the record supports the conclusion that the July 11, 2008 disclaimer letter was untimely as a matter of law as to the plaintiff.

"An insurer's failure to provide notice as soon as is reasonably possible precludes effective disclaimer, even where the policyholder's own notice of the incident to its insurer is untimely." *First Financial Ins. Co. v. Jetco Contracting Corp.*, 1 N.Y.3d 64, 769 N.Y.S.2d 459 (2003). *See also Continental Cas. Co. v. Stradford, supra* at 449-450; *New York Cent. Mut. Fire Ins. Co. v. Aguirre*, 7 N.Y.3d 772, 854 N.Y.S.2d 146 (2006); *Hartford Ins. Co. v. Nassau County*, 46 N.Y.2d 1028, 416 N.Y.S.2d 539 (1979); *Scott McLaughlin Truck & Equipment Sales, Inc. v. Selective Ins. Co. of America*, 68 A.D.3d 1619, 893 N.Y.S.2d 297 (3d Dept. 2009); *Felice v. Chubb & Son, Inc.*, 67 A.D.3d 861, 888 N.Y.S.2d 437 (2d Dept. 2009). *Cf. Utica First Ins. Co. v. Arken, Inc.*, 18 A.D.3d 644, 795 N.Y.S.2d 640 (2d Dept. 2005).

The timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage. *See First Financial Ins. Co. v. Jetco Contracting Corp, supra* at 68-69; *Continental Cas. Co. v. Stradford, supra* at 449-450. When "the basis for denying coverage was or should have been readily

apparent before the onset of the delay [of disclaimer]," the insurer's explanation is insufficient as a matter of law. *See First Financial Ins. Co. v. Jetco Contracting Corp, supra* at 69.

While "[t]he timeliness of a carrier's disclaimer based on its insured's alleged violation of the policy's cooperation clause" is generally a factual question, nevertheless, "[w]hen 'the basis for denying coverage was or should have been readily apparent before the onset of the delay [of disclaimer],' the insurer's explanation is insufficient as a matter of law." *See Continental Cas. Co. v. Stradford, supra* at 449; *Gulf Ins. Co. v. Stradford*, 59 A.D.3d 598, 873 N.Y.S.2d 713 (2d Dept. 2009); *New York Cent. Mut. Fire Ins. Co. v. Aguirre, supra* at 774; *Hartford Ins. Co. v. Nassau County, supra* at 1029-1030.

Significantly, "[a] reservation of rights letter has no relevance to the question whether the insurer has timely sent a notice of disclaimer of liability or denial of coverage." *See Hartford Ins. Co. v. Nassau County, supra*; *New York Cent. Mut. Fire Ins. Co. v. Hildreth*, 40 A.D.3d 602, 835 N.Y.S.2d 409 (2d Dept. 2007). Additioanally "an injured third party may seek recovery from an insured's carrier despite the failure of the insured to provide timely notice of the accident." *See General Acc. Ins. Group v. Cirucci*, 46 N.Y.2d 862, 414 N.Y.S.2d 512 (1979). "The burden of justifying that two-month delay in disclaiming rests" with the carrier. *See Scott McLaughlin Truck & Equipment Sales, Inc. v. Selective Ins. Co. of America, supra* at 1620; *Felice v. Chubb & Son, Inc., supra* at 861-862.

Here, and as described by Geico's two principal affiants – Moran and Blakes, Geico's last and final telephonic efforts to contact Johnson occurred on or abut May 13, 2008 – after which a period of almost two months elapsed before the disclaimer letter was finally issued on or about July 11, 2008. *See Continental Cas. Co. v. Stradford, supra* at 449-450; *Hartford Ins. Co. v. Nassau County, supra*; *First Financial Ins. Co. v. Jetco Contracting Corp., supra* at 69.

At this juncture, *i.e.*, in mid-May of 2008, Geico was aware of the non-cooperation based disclaimed theory. *See* Moran Aff., ¶ 11.

Although "investigation into issues affecting an insurer's decision whether to disclaim coverage obviously may excuse delay in notifying the policyholder of a disclaimer," there is no evidence here that any further analysis or investigative efforts were made or required after Geico ceased its efforts to contact Johnson in mid-May of 2008. *See First Financial Ins. Co. v. Jetco Contracting Corp.*, *supra* at 67; *Scott McLaughlin Truck & Equipment Sales, Inc. v. Selective Ins. Co. of America*, *supra* at 1620-1621.

While in early May, 2008, the insured's alleged friend, "Angela" apparently attempted to broker a three-way telephone conference call which failed, there is nothing in the record which establishes that Johnson was aware of – or a party to – Angela's efforts. *See* Blakes Aff., ¶¶ 9-10. Nor does the evidence support the view that sporadic instances of cooperation existed which would warrant further and additional consideration once the last calls to Johnson and "Angela" went unanswered on May 13, 2008. *See Continental Cas. Co. v. Stradford, supra* at 449-450.

The Court of Appeals holding in *Continental Cas. Co. v. Stradford, supra*, relied on by Geico, is distinguishable. In that case, there existed a six-year period of sporadic, on-again, off-again cooperation, punctuated by contradictory patterns of affirmatively obstructive conduct. Since the assessing insured's actual intent was "obscured by repeated pledges to cooperate and actual cooperation," the Court found that further analysis and consideration by the carrier may have been warranted, thereby creating an issue of fact as to whether an ensuing, two-month delay in disclaiming was reasonable. *See id.* at 449-450.

Here, in contrast, there was no complex or contradictory "pattern of [cooperation and] obstructive conduct * * * permeat[ing] the insurer's relationship with its insured for almost six

years," which would justify the additional period of delay which took place. *See Hartford Ins. Co. v. Nassau County*, *supra* at 1030; *Scott McLaughlin Truck & Equipment Sales, Inc. v. Selective Ins. Co. of America*, *supra* at 1620-1621.

The Court has considered Geico's remaining contentions and concludes that they are lacking in merit. S*ee Lang v. Hanover Ins. Co.*, *supra* at 356; *Bowker v. NVR, Inc.*, *supra* at 1164.

Accordingly, it is,

**ORDERED** that plaintiff's motion for summary judgment pursuant to CPLR 3212 and Insurance Law § 3420 is hereby granted.

This constitutes the decision and order of this Court.

**ENTER:**

**DENISE L. SHER, A.J.S.C.**
**XXX**

Dated: Mineola, New York
June 24, 2010

**ENTERED**
JUL 02 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE