

309 A.D.2d 616, 767 N.Y.S.2d 411, 2003 N.Y. Slip Op. 17624  
(Cite as: 309 A.D.2d 616, 767 N.Y.S.2d 411)

## **N**

Supreme Court, Appellate Division, First Department,  
New York.  
AJ CONTRACTING COMPANY INC., Plaintiff-  
Appellant,  
v.  
FOREST DATACOM SERVICES INC., Defendant,  
CIGNA Property & Casualty Insurance Company,  
Defendant-Respondent.  
[And a Third-Party Action].  
Oct. 21, 2003.

General contractor brought action against subcontractor's insurer, as an additional insured. The Supreme Court, New York County, Paula Omansky, J., granted insurer's motion for summary judgment, and denied contractor's motion for summary judgment and a declaration that insurer was obligated to defend contractor in underlying personal injury action. Contractor appealed. The Supreme Court, Appellate Division, held that: (1) genuine issue of material fact existed as to whether insurer evinced to contractor and its agents a willingness to permit a claimant to tender a claim orally, rather than strictly enforce its policy requirement of written notice, precluding summary judgment for insurer on ground that contractor failed to provide written notice; (2) insurer's disclaimer of coverage excused contractor from complying with term of subcontractor's policy obligating contractor to obtain insurer's consent before settlement of any matter; and (3) pursuant to policy endorsement, insurer had no duty to defend contractor.

Affirmed as modified.

### West Headnotes

#### [1] Judgment 228 ⇨ 181(23)

##### 228 Judgment

228V On Motion or Summary Proceeding  
228k181 Grounds for Summary Judgment

##### 228k181(15) Particular Cases

228k181(23) k. Insurance Cases. Most

##### Cited Cases

Genuine issue of material fact existed as to whether subcontractor's insurer evinced to general contractor and its agents a willingness to permit a claimant to tender a claim orally, rather than strictly enforce its policy requirement of written notice, precluding summary judgment for insurer on ground that contractor failed to provide written notice of underlying personal injury action.

#### [2] Insurance 217 ⇨ 3110(1)

##### 217 Insurance

217XXVI Estoppel and Waiver of Insurer's Defenses

217k3105 Claims Process and Settlement

217k3110 Denial or Disclaimer of Liability on Policy

217k3110(1) k. In General. Most Cited Cases

Insurer's disclaimer of coverage excused general contractor from complying with term of subcontractor's policy obligating contractor, as an additional insured, to obtain insurer's consent before settlement of underlying personal injury action.

#### [3] Insurance 217 ⇨ 2911

##### 217 Insurance

217XXIII Duty to Defend

217k2911 k. In General; Nature and Source of Duty. Most Cited Cases

Subcontractor's insurer had no duty to defend general contractor, as an additional insured, in underlying personal injury action, where policy endorsement stated that, in view of subcontractor's entry into a third-party agreement for purposes of investigation and adjustment of claims, insurer "shall not have any duty to defend any such suit."

\*\*411 Liza R. Fleissig, for Plaintiff-Appellant.

Aidan M. McCormack, for Defendant-Respondent.

309 A.D.2d 616, 767 N.Y.S.2d 411, 2003 N.Y. Slip Op. 17624  
(Cite as: 309 A.D.2d 616, 767 N.Y.S.2d 411)

MAZZARELLI, J.P., SAXE, SULLIVAN, ELLERIN, GONZALEZ, JJ.

\*616 Order, Supreme Court, New York County (Paula Omansky, J.), entered January 2, 2002, which, *inter alia*, granted the motion of defendant CIGNA Property & Casualty Insurance Company for summary judgment dismissing the claim of plaintiff AJ \*\*412 Contracting Company against it, and denied plaintiff's motion for summary judgment and a declaration that CIGNA was obligated to defend plaintiff in an underlying personal injury action, unanimously modified, on the law, so as to grant the motion of CIGNA only to the extent of declaring that CIGNA has no obligation to defend AJ Contracting in the underlying personal injury action, and otherwise deny defendant-respondent's motion and reinstate the complaint, and otherwise affirmed, without costs.

The core of the current dispute regarding insurance coverage initially focuses on whether AJ Contracting, as an additional insured under the CIGNA insurance policy procured by Forest \*617 Datacom Services, gave proper timely notice of the claim to CIGNA. CIGNA claims that it did not receive the requisite written notice until it was served with the third-party summons and complaint in November 1998, well outside the time frame for proper notice.

[1] The CIGNA policy requires written notice of a claim, and we agree with the motion court's implicit conclusion that plaintiff failed to establish written notice to CIGNA as a matter of law by the testimony of Travelers' representative Mary Kawas-Rutolo. However, other documentation regarding communications between CIGNA and Travelers during the spring of 1998 have a bearing on this claim. Review of these documents leads us to conclude that a question of fact exists as to whether CIGNA evinced to AJ and its agents a willingness to permit a claimant to tender a claim orally, rather than strictly enforce its policy requirement of written notice.

A letter by Forest's third-party claims administrator, ESIS, dated April 28, 1998, while rejecting Traveler's tender of AJ's claim pursuant to Forest's contractual indemnification obligation, advised that "Carolann Myrtetus of INA [CIGNA] is evaluating whether the tender will be accepted pursuant to the insurance procurement obligation." Although in her affidavit Myrtetus denied any knowledge of the correspondence between ESIS and Travelers, her reservation of rights letter on behalf of CIGNA on June 3, 1998 acknowledged Travelers' "oral request of May 14, 1998," and contained no indication that CIGNA required written notice of the claim in order to evaluate it. Both letters tend to show that CIGNA received notice of the claim being tendered by AJ Contracting and, rather than rejecting the tender outright because it was not in writing, had decided to proceed with an evaluation of its merits. While the affidavit of CIGNA representative Anne Donohue states that CIGNA demanded compliance with the policy's notice requirements, the letter to which she refers made no specific reference to the requirement that notice be in writing. Accordingly, we conclude that summary judgment should not have been granted on the ground that CIGNA received no written notice; rather, first there must be a factual determination as to whether CIGNA's conduct communicated that it would not rely upon the policy's requirement of written notice, and if so, whether CIGNA received such notice as was necessary.

[2] CIGNA also claims that it was entitled to summary judgment because the settlement payment made by AJ was voluntary. However, assuming the notice issue is resolved against CIGNA, CIGNA's disclaimer of coverage excused AJ \*618 from complying with the term of the policy obligating it to obtain the insurer's consent before settlement of any matter (*see American Ref-Fuel Co. of Hempstead v. Resource Recycling, Inc.*, 281 A.D.2d 573, 574, 722 N.Y.S.2d 570).

\*\*413 [3] We agree with CIGNA that its duty to defend is entirely eliminated by policy Endorse-

309 A.D.2d 616, 767 N.Y.S.2d 411, 2003 N.Y. Slip Op. 17624  
(Cite as: 309 A.D.2d 616, 767 N.Y.S.2d 411)

ment 70, which states that, in view of Forest's entry into a third-party agreement with ESIS for purposes of investigation and adjustment of claims, CIGNA "shall not have any duty to defend any such 'suit.'"

Finally, on this record, there is nothing to support the conclusion that AJ intentionally spoliated evidence, or, indeed, even that any evidence was spoliated. At best, all that is shown is that some boxes listed on a printout were missing from the warehouse, but nothing is demonstrated as to what was even in the boxes.

Accordingly, the matter must be remanded for trial.

The Decision and Order of this Court entered herein on May 8, 2003, is hereby recalled and vacated. See M-2881 decided simultaneously herewith.

N.Y.A.D. 1 Dept.,2003.  
AJ Contracting Co. Inc. v. Forest Datacom Services Inc.  
309 A.D.2d 616, 767 N.Y.S.2d 411, 2003 N.Y. Slip Op. 17624

END OF DOCUMENT