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--- N.Y.S.2d ---, 35 A.D.3d 830, 2006 WL 3801939 (N.Y.A.D. 2 Dept.), 2006 N.Y. Slip Op. 10042

**Briefs and Other Related Documents**

Supreme Court, Appellate Division, Second Department, New York.  
Michelle **REYES**, appellant,

v.

**DIAMOND STATE INSURANCE COMPANY**, respondent; et al., defendants.  
Dec. 26, 2006.

**Background:** In action seeking declaration that insurer was obligated to provide excess coverage with respect to underlying personal injury action, the Supreme Court, Kings County, Vaughan, J., denied plaintiff's motion for summary judgment and granted defendant's cross motion for summary judgment. Plaintiff appealed.

**Holding:** The Supreme Court, Appellate Division, held that excess insurer's unexcused delay of 50 days in giving written notice of disclaimer of coverage was unreasonable as a matter of law.

Reversed.

[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(2) k. Failure, Delay, or Inadequacy. Most Cited Cases

An insurer must give written notice of a disclaimer of coverage as soon as is reasonably possible after it first learns of the accident or of grounds for disclaimer of liability or denial of coverage. McKinney's Insurance Law § 3420.

[2]

☞ 217 Insurance

☞ 217XXVI Estoppel and Waiver of Insurer's Defenses

☞ 217k3105 Claims Process and Settlement

☞ 217k3110 Denial or Disclaimer of Liability on Policy

☞ 217k3110(2) k. Failure, Delay, or Inadequacy. Most Cited Cases

An insurer's obligation to give written notice of disclaimer as soon as reasonably possible applies not only to an insurer's disclaimer of primary insurance coverage, but to a disclaimer of excess coverage as well, although the obligation of an excess insurance carrier is not implicated where the insured fails, through no fault of the excess insurer, to make a claim against the primary policy. McKinney's Insurance Law § 3420.

[3]

☞ 217 Insurance

☞ 217XXVI Estoppel and Waiver of Insurer's Defenses

☞ 217k3105 Claims Process and Settlement

☞ 217k3110 Denial or Disclaimer of Liability on Policy

☞ 217k3110(2) k. Failure, Delay, or Inadequacy. Most Cited Cases

Excess insurer's unexcused delay of 50 days in giving written notice of disclaimer of coverage in

underlying personal injury action was unreasonable as a matter of law, where insurer had been advised of facts surrounding accident by police accident report within days of accident and insurer sought to deny coverage on ground that driver of insured vehicle was unauthorized driver. McKinney's Insurance Law § 3420.

Carman, Callahan & Ingham, LLP, Farmingdale, N.Y. (Michael F. Ingham of counsel), for appellant. Nicoletti Gonson & Sprinners, LLP, New York, N.Y. (Edward S. Benson of counsel), for respondent.

ROBERT W. SCHMIDT, J.P., STEPHEN G. CRANE, ROBERT A. SPOLZINO, and JOSEPH COVELLO, JJ.

**\*1** In an action for a judgment declaring that the defendant **Diamond** State Insurance Company is obligated to provide excess coverage with respect to an underlying personal injury action entitled *Astacio v. Dollar Rent A Car Systems*, pending in the Supreme Court, Kings County, under Index No. 4283/02, pursuant to a policy of insurance issued to the plaintiff, the plaintiff appeals from an order of the Supreme Court, Kings County (Vaughan, J.), dated March 9, 2005, which denied her motion for summary judgment declaring that the defendant **Diamond** State Insurance Company was obligated to provide the excess coverage, and granted the cross motion of the defendant **Diamond** State Insurance Company for summary judgment declaring that it is not obligated to provide the excess coverage.

ORDERED that the order is reversed, on the law, with costs, the motion is granted, the cross motion is denied, and the matter is remitted to the Supreme Court, Kings County, for the entry of an appropriate judgment declaring that the defendant **Diamond** State Insurance Company was obligated to provide the excess coverage with respect to the underlying personal injury action pursuant to the policy of insurance.

[1][2] An insurer must give written notice of a disclaimer of coverage "as soon as is reasonably possible" (Insurance Law § 3420) after it "first learns of the accident or of grounds for disclaimer of liability or denial of coverage" (Hartford Ins. Co. v. County of Nassau, 46 N.Y.2d 1028, 1029, 416 N.Y.S.2d 539, 389 N.E.2d 1061; see Matter of New York Cent. Mut. Fire Ins. Co. v. Aguirre, 7 N.Y.3d 772, 774, 820 N.Y.S.2d 848, 854 N.E.2d 146; First Fin. Ins. Co. v. Jetco Contr. Corp., 1 N.Y.3d 64, 68-69, 769 N.Y.S.2d 459, 801 N.E.2d 835; Matter of Allstate Ins. Co. v. Cruz, 30 A.D.3d 511, 512, 817 N.Y.S.2d 129). This rule applies not only to an insurer's disclaimer of primary insurance coverage, but to a disclaimer of excess coverage as well (see Mann v. Gulf Ins. Co., 3 A.D.3d 554, 555-556, 771 N.Y.S.2d 176). Although the obligation of an excess insurance carrier is not implicated where the insured fails, through no fault of the excess insurer, to make a claim against the primary policy (see Matter of Allcity Ins. Co. [Sioukas], 51 A.D.2d 525, 378 N.Y.S.2d 711, *affd.* 41 N.Y.2d 872, 393 N.Y.S.2d 993, 362 N.E.2d 623), that situation is not presented here.

[3] The plaintiff demonstrated her prima facie entitlement to summary judgment by showing that the subject car accident fell within the coverage provisions of the insurance policy issued by the defendant **Diamond** State Insurance Company (hereinafter **Diamond**), that **Diamond** disclaimed coverage on the ground that the driver of the automobile for which it provided excess liability insurance was an unauthorized driver, that **Diamond** learned of this ground for disclaiming coverage within days of the accident, when it received a copy of a police accident report (see Allstate Ins. Co. v. Kuper, 140 A.D.2d 479, 480, 528 N.Y.S.2d 591), and that **Diamond** did not disclaim for 50 days thereafter (see First Fin. Ins. Co. v. Jetco Contr. Corp., *supra*; National Cas. Co. v. Levittown Events, 191 A.D.2d 543, 595 N.Y.S.2d 93; cf. Nigro v. General Acc. Ins. Co. of N.Y., 239 A.D.2d 474, 658 N.Y.S.2d 963). In opposition, **Diamond** failed to raise a triable issue of fact. **Diamond** proffered no excuse for its delay and it was not entitled to wait until the plaintiff's primary coverage was exhausted before disclaiming. To the extent that Gardner v. Ryder Truck Rental, 261 A.D.2d 505, 690 N.Y.S.2d 614 holds to the contrary, it should no longer be followed.

**\*2** Accordingly, the Supreme Court should have granted the plaintiff's motion for summary judgment declaring that **Diamond** was obligated to provide coverage, and denied **Diamond's** cross motion for summary judgment declaring that it was not so obligated.

Since this is a declaratory judgment action, we remit the matter to the Supreme Court, Kings County, for the entry of a judgment declaring that **Diamond** was obligated to provide the excess coverage with respect to the underlying personal injury action pursuant to the policy of insurance (see Lanza v. Wagner, 11 N.Y.2d 317, 334, 229 N.Y.S.2d 380, 183 N.E.2d 670, *cert. denied* 371 U.S. 901, 83 S.Ct. 205, 9 L.Ed.2d 164).

N.Y.A.D. 2 Dept., 2006.

**Reyes v. Diamond State Ins. Co.**

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**Briefs and Other Related Documents ([Back to top](#))**

- [2005 WL 5061304](#) (Appellate Brief) Reply Brief for Plaintiff-Appellant (Oct. 7, 2005)
- [2005 WL 5061303](#) (Appellate Brief) Brief for Defendant-Respondent Diamond State Insurance Company (Sep. 6, 2005)
- [2005 WL 5061302](#) (Appellate Brief) Brief for Plaintiff-Appellant (Aug. 2, 2005)

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