UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 13-5863-GW(Ex)	Date	May 22, 2014
Title	*Pitzer College v. Indian Harbor Insurance Company, et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	Katie Thibodeaux	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
Lawrence J. DiPinto	Maximilian Hunter Stern

PROCEEDINGS: DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AGAINST PITZER COLLEGE [21]

Court hears oral argument. The Tentative circulated and attached hereto, is adopted as the Court's Final Ruling. Defendants' motion is GRANTED and defense counsel are ordered to prepare and file a Proposed Judgment forthwith.

All previously set deadlines and hearings are vacated and TAKEN OFF-CALENDAR.

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Initials of Preparer JG

Pitzer Coll. v. Indian Harbor Ins. Co., Case No. CV-13-05863-GW (Ex)
Tentative Ruling on Motion for Summary Judgment

In a First Amended Complaint ("FAC") filed March 12, 2014 in this action, Pitzer College ("Plaintiff" or "Pitzer") asserted two claims for relief against Indian Harbor Insurance Company ("Defendant"), for 1) declaratory relief and 2) breach of contract. The case involves Plaintiff's pursuit of indemnification for lead-remediation expenses under a Pollution and Remediation Legal Liability Policy ("the Policy") Defendant issued, covering Plaintiff, with a policy term of July 23, 2010 to July 23, 2011. *See* FAC ¶¶ 6-7. Plaintiff's declaratory relief claim asks for a determination and declaration of the parties' respective rights and duties under the contract (and that Defendant is obligated to indemnify Plaintiff), and its breach of contract claim seeks to establish that Defendant breached the Policy, the implied covenant of good faith and fair dealing by failing to indemnify Plaintiff, and two incorporated-into-the-Policy regulatory requirements. *See id.* ¶¶ 21, 25-26. Defendant now moves for summary judgment, arguing that it has no obligation under the parties' insurance contract because Plaintiff gave late notice to Defendant and failed to obtain Defendant's consent before incurring lead remediation costs.

A. Summary Judgment Standard

Summary judgment shall be granted when a movant "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In other words, summary judgment should be entered against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Parth v. Pomona Valley Hosp. Med. Ctr.*, 630 F.3d 794, 798-99 (9th Cir. 2010).

To satisfy its burden at summary judgment, a moving party without the burden of persuasion "must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at

trial." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000); *see also Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (*en banc*); *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir. 2000). With respect to a moving party with the burden of persuasion, "to prevail on summary judgment it must show that the evidence is so powerful that no reasonable jury would be free to disbelieve it." *Shakur v. Schriro*, 514 F.3d 878, 890 (9th Cir. 2008) (omitting internal quotation marks).

> If the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact, the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment[, but instead] must set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial.

T.W. Elec. Serv., Inc., v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir.1987) (internal citations and quotation marks omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence, and views all evidence and draws all inferences in the light most favorable to the non-moving party. *See T.W. Elec.*, 809 F.2d at 630-31 (citing *Matsushita*); *see also Hrdlicka v. Reniff*, 631 F.3d 1044 (9th Cir. 2011); *Motley v. Parks*, 432 F.3d 1072, 1075 n.1 (9th Cir. 2005) (*en banc*); *Miranda v. City of Cornelius*, 429 F.3d 858, 860 n.1 (9th Cir. 2005).

B. Defendant's Evidentiary Objections (Docket No. 26-2)

1. Overrule.
2. Sustain.
3. Overrule.

C. Pertinent Undisputed Facts

1. The Underlying Event and Plaintiff's Response

On January 10, 2011, Plaintiff's Vice President for Administration/Treasurer, Yuet Lee, learned of the discovery of darkened/discovered soils at a site Plaintiff was using for the construction of a new dormitory. *See* Defendant's Response to Statement of

Genuine Disputes in Support of its Motion for Summary Judgment ("DR"), Docket No. 26-1, ¶¶ 1, 50.[1] Test results the next day revealed a "contamination situation," and by January 21, 2011, Plaintiff believed that remediation would be required. *See id.* ¶ 2. The limits of the contamination were entirely on-site, no dorms were evacuated, and no restrictions were placed beyond the project boundaries. *See id.* ¶ 24. Delay in construction due to the contamination, however, threatened non-completion of the dormitory and increased costs. *See id.* ¶¶ 60-61, 68.

Plaintiff had a proposed Soil Management Plan from its consultants by February 1, 2011. *See id.* ¶ 26. On February 14, one of its consultants provided Plaintiff with a summary of cost estimates for four possible remediation options. *See id.* ¶ 53. But from February 1 through February 16, 2011, there were "[g]enerally no activities" at the site of the pollution condition. *See id.* ¶ 27. From February 16 to February 27, 2011, Plaintiff entered a "Remediation Strategy and Pricing" phase of the remediation efforts, during which time it was weighing its remediation options, ultimately deciding to conduct the remediation using an onsite treatment system called a Transportable Treatment Unit ("TTU"). *See id.* ¶ 28. The TTU was available at the time Plaintiff needed it, despite the fact that there are only two such units in Southern California licensed for the Plaintiff's purpose and they are typically reserved far in advance. *See id.* ¶ 56. Because a delay in acting upon its availability could cause loss of that opportunity and consequential recourse to a more costly approach, Plaintiff retained the TTU. *See id.* Remediation using the TTU began on March 10, 2011. *See id.* ¶ 58. Plaintiff completed its remediation on either April 9 or April 12, 2011, with Plaintiff claiming to have paid nearly $2 million in remediation expenses. *See id.* ¶¶ 7-8, 58.

2. The Policy, Plaintiff's Awareness of it, and Plaintiff's Notice

The Policy's Coverage B covers "Remediation Legal Liability." *Id.* ¶ 3. As a "condition precedent" to that coverage (noted in a section of the Policy labeled "Reporting, Defense, Settlement and Cooperation"), Plaintiff "shall provide to [Defendant], whether orally or in writing, notice of the particulars with respect to the time, place and circumstances thereof.... In the event of oral notice, [Plaintiff] agrees to

[1] Defendant's Response to Statement of Genuine Disputes in Support of its Motion for Summary Judgment ("DR") includes purported uncontroverted facts proffered by Defendant at paragraphs 1-49, and additional purported undisputed material facts proffered by Plaintiff at paragraphs 50-71.

furnish to [Defendant] a written report as soon as practicable." *Id.* ¶ 4.[2] In addition, the Policy provides (also in the "Reporting, Defense, Settlement and Cooperation" section) as follows:

> No costs, charges or expenses shall be incurred, nor payments made, obligations assumed or remediation commenced without [Defendant's] written consent which shall not be unreasonably withheld. This provision does not apply to costs incurred by [Plaintiff] on an emergency basis, where any delay on the part of [Plaintiff] would cause injury to persons or damage to property, or increase significantly the cost of responding to any POLLUTION CONDITION. If such emergency occurs, [Plaintiff] shall notify [Defendant] immediately thereafter.

Id. ¶ 5.[3] The Policy also contains a Choice of Law provision stating that "[a]ll matters arising hereunder including questions related to the validity, interpretation, performance and enforcement of this Policy shall be determined in accordance with the law and practice of the State of New York (notwithstanding New York's conflicts of law rules)." *Id.* ¶ 6.

Plaintiff did not give notice to Defendant of its discovery of the pollution condition until July 11, 2011. *See id.* ¶ 10. Nor did it seek or obtain Defendant's written consent before commencing remediation, incurring remediation expenses, or paying the $2 million it now seeks from Defendant. *See id.* ¶ 11.

The Claremont University Consortium ("CUC") is Plaintiff's agent for purposes of insurance, and CUC had possession of or other access to the insurance policies issued to it and its member colleges, such as Plaintiff. *See id.* ¶¶ 13, 63. Plaintiff's former Vice President of Administration/Treasurer, Vicke Selk, knew from 1999 to when she left in 2008 that pollution liability policies insuring Plaintiff covered remediation of historical contamination found on campus. *See id.* ¶ 14. In addition, through 2010, CUC provided Plaintiff with annual renewal information demonstrating coverage for "Remediation Expense" (though Plaintiff disputes its representatives' understanding of that term). *See id.* ¶ 15.

Lee replaced Selk in 2008 as Plaintiff's officer responsible for insurance (though not for the purchase or negotiation of such insurance). *See id.* ¶ 16. Lee knew of the

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[2] The Court will hereafter refer to this provision as "the Notice Provision."

[3] The Court will hereafter refer to this provision as "the Consent/Emergency Provision."

Policy's existence, but did not know the Policy covered historical contamination caused by third parties. *See id.* ¶¶ 17-18, 62. He did not think about insurance during the remediation process and did not take any steps to learn about the scope of the Policy either upon starting his job or during remediation. *See id.* ¶¶ 19-20. When he was advised that "private insurance recovery" might be one option for funding remediation, Lee took no action based upon his understanding of the situation. *See id.* ¶ 21. Though he had the time to do so, Lee did not call CUC, the broker, or Plaintiff, because of his understanding of the Policy's coverage. *See id.* ¶¶ 25, 30. He did, however, have the time to notify other Pitzer administrators and the President of the remediation efforts. *See id.* ¶ 29.

Lee first asked CUC about coverage for the remediation no later than June 17, 2011. *See id.* ¶¶ 31, 65. On June 28, CUC encouraged Lee to report the remediation claim. *See id.* ¶ 32; *see also id.* ¶ 66. On July 2, CUC e-mailed Lee, indicating to him that the claim should be submitted "as soon as possible." *Id.* ¶ 33. Plaintiff ultimately provided notice to Defendant on July 11, 2011, when its broker called one of Defendant's underwriters. *See id.* ¶¶ 35, 67. On August 10, 2011, Defendant acknowledged receipt of notice, asking whether coverage was sought, requesting other information, and noting that pre-notice costs would not be covered under the Policy. *See id.* ¶ 36. Defendant's letter did not refer to the Policy's emergency provision, but Plaintiff's agent only first argued on *June 12, 2012*, that there had been "exigent circumstances" excusing performance under the policy. *See id.* ¶¶ 39, 71. Plaintiff did not respond to Defendant's August 10 letter. *See id.* ¶ 38. On March 16, 2012, Defendant denied coverage based on Plaintiff's late notice and failure to obtain Defendant's consent. *See id.*

3. Defendant's Corporate Background and Connections to New York

Defendant is part of the Insurance operating segment of XL Group plc, a global insurance and reinsurance company providing property, casualty and specialty products to industrial, commercial and professional firms, insurance companies, and other enterprises on a worldwide basis. *See id.* ¶ 41. Defendant is also a subsidiary of XL Specialty Insurance Company, which is, in turn, a subsidiary of XL Reinsurance America Inc, incorporated in New York. *See id.* ¶ 42.

Defendant itself is a Delaware company with a principal place of business in

Stamford, Connecticut. *See id.* ¶ 43. It conducts its business out of multiple locations in the United States, including an office at One World Financial Center, 200 Liberty Street, 22nd Floor, New York, NY 10281. *See id.* XL Environmental, the business unit that underwrote the Policy, has underwriters located in this New York office. *See id.* ¶ 45. Defendant's current CEO/President/Chairman, its General Counsel, and three of its eight corporate directors are located in New York. *See id.* ¶ 44. The same is true of its former CEO/President/Chairman, whose signature appears on the Policy. *See id.* Defendant regularly issues policies to insureds domiciled in New York and policies insuring locations in New York. *See id.* ¶ 46.[4] Because of these contacts, and others over time, Defendant has elected to include a New York choice of law clause in its Pollution and Remediation Legal Liability policies. *See id.* ¶ 47.

D. Analysis

1. Placement of the Burden

Defendant is moving for summary judgment, challenging both of Plaintiff's claims for relief. Plaintiff's declaratory relief claim is essentially dependent on the outcome of its breach of contract claim. To make out a breach of contract claim, it is incumbent upon Plaintiff to demonstrate its own performance or excuse for performance, regardless of whether California or New York law applies. *See Rutherford Holdings, LLC v. Plaza Del Rey*, 223 Cal.App.4th 221, 228 (2014) ("A cause of action for damages for breach of contract is comprised of the following elements: (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff.") (quoting *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal.App.3d 1371, 1388 (1990)); *N.Y. State Workers' Comp. Bd. v. SGRisk, LLC*, 983 N.Y.S.2d 642, 648 (N.Y. App. Div. 2014) ("The elements of [a breach of contract cause of action] are formation of a contract, performance by one party, failure to perform by another, and resulting damage."); *Krigsfeld v. Feldman*, 982 N.Y.S.2d 487, 488 (N.Y. App. Div. 2014); *Latham Land I, LLC v. TGI Friday's, Inc.*, 948 N.Y.S.2d 147, 150 (N.Y. App. Div. 2012) ("A condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises.") (omitting internal quotation marks); *see also UNUM*

[4] The Policy here, however, was not "issued or delivered" in New York. *See* DR ¶ 49.

Life Ins. Co. of Am. v. Ward, 526 U.S. 358, 369 (1999) ("Ordinarily, 'failure to comply with conditions precedent...prevents an action by the defaulting party to enforce the contract.'") (quoting 14 Cal. Jur.3d, Contracts § 245, p. 542 (3d ed. 1974)). Insofar as Plaintiff bears the burden of making that showing, in order to prevail on this motion Defendant need only satisfy the summary judgment standard established in *Nissan Fire*, as set forth above.

2. Choice of Law

Which law applies is a threshold issue here, because it could have an impact at least on the requirements for Defendant's reliance on the Notice Provision, if not also the Consent/Emergency Provision. The Court employs California's choice-of-law rules here due to the fact that the case is in federal court by way of diversity jurisdiction. *See Mortensen v. Bresnan Commc'ns, LLC*, 722 F.3d 1151, 1161 (9th Cir. 2013). "If the parties state their intention in an express choice-of-law clause, California courts ordinarily will enforce the parties' stated intention...." *Hatfield v. Halifax PLC*, 564 F.3d 1177, 1182 (9th Cir. 2009) (quoting *Frontier Oil Corp. v. RLI Ins. Co.*, 153 Cal.App.4th 1436, 1450 n.7 (2007)); *see also* Croskey & Heeseman, California Practice Guide: Insurance Litigation (2008) § 15:609, at 15-100. There is no question here that the parties "state[d] their intention" to apply "the law and practice of the State of New York." DR ¶ 6.

Once the parties' intention regarding choice of law is determined, the analysis turns to "whether: (1) the chosen jurisdiction has a substantial relationship to the parties or their transaction; or (2) any other reasonable basis for the choice of law provision exists." *Hatfield*, 564 F.3d at 1182. If either one of these tests is met, then the choice-of-law provision will be enforced "unless the chosen jurisdiction's law is contrary to California public policy." *Id.* Given the parties' submission on this point, the Court[5] has no question that there is at least a "reasonable basis" for the selection of New York law. *See* DR ¶¶ 41-47.

The question is then whether New York law is contrary to California public policy. In fact, as the question is normally formulated – including in Ninth Circuit

[5] A conflicts-of-law application is a legal question for the Court. *See Matter of Yagman*, 796 F.2d 1165, 1171 n.2 (9th Cir. 1986).

decisions issued both before (dating back to at least 1979) *and* after *Hatfield* and as provided by one of the two California cases *Hatfield itself* cited for the general proposition – the Court is to look to whether New York law is contrary to a *fundamental* California public policy. *See, e.g.*, *Bridge Fund Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1002-03 (9th Cir. 2010); *Hoffman v. Citibank (S.D.), N.A.*, 546 F.3d 1078, 1082 (9th Cir. 2008); *Sarlot-Kantarjian v. First Pa. Mortg. Trust*, 599 F.2d 915, 917 (9th Cir. 1979); *see also Hatfield*, 564 F.3d at 1182 (quoting *Hambrecht & Quist Venture Partners v. Am. Med. Int'l, Inc.*, 38 Cal.App.4th 1532, 1544-45 (1995)).

Plaintiff believes it has identified a fundamental California public policy that application of New York law would contravene in the form of the "notice-prejudice rule" – the rule that, in order for an insurer to rely upon an insured's failure to provide required notice as a reason to deny policy benefits, the insurer must have been prejudiced thereby. *See generally* Croskey & Heeseman, California Practice Guide: Insurance Litigation (2013) § 3:168, at 3-54.1 – 55. If prejudice is required, Defendant would not be able to prevail at summary judgment by relying on the Notice Provision. To support its view that this rule constitutes a fundamental public policy – or, under Plaintiff's favored expression of the rule, a "strong" public policy[6] – Plaintiff directs the Court to five decisions (including one unpublished Ninth Circuit Memoranda Disposition), an *amicus* brief the State of California joined in one of those cases, and California Civil Code § 3275.[7] *See UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 372 (1999); *Ins. Co. of State of Pa. v. Associated Int'l Ins. Co.*, 922 F.2d 516, 524 (9th Cir. 1990); *Serv. Mgmt. Sys., Inc. v. Steadfast Ins. Co.*, 216 Fed. Appx. 662, 664 (9th Cir. Jan. 4, 2007); *Campbell v. Allstate Ins. Co.*, 60 Cal.2d 303, 307 (1963); *Steadfast Ins. Co. v. Casden Props., Inc.*, 837 N.Y.S.2d 116 (N.Y. App. Div. 2007); *see also* Cal. Civ. Code § 3275 ("Whenever,

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[6] The Ninth Circuit has, on occasion, employed the "strong" – as opposed to "fundamental" – public policy nomenclature. *See, e.g.*, *Haisten v. Grass Valley Med. Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1402-03 (9th Cir. 1986); *see also Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1338 (9th Cir. 1980). Regardless, as discussed further *infra*, the cases Plaintiff cites in support of its conclusion that the notice-prejudice rule constitutes a "strong public policy" of the State of California were not decided in the context of a choice-of-law analysis.

[7] Defendant cites several unpublished decisions applying New York's late-notice rule in its briefing. The Court has no need to rely on those decisions due to the shortcomings of Plaintiff's own chosen authority on this point, as discussed *infra*.

by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in a case of a grossly negligent, willful, or fraudulent breach of duty.").[8]

The Supreme Court's decision in *Ward* considered whether California's "notice-prejudice" rule "regulate[d] insurance" within the meaning of ERISA's savings clause. *See* 526 U.S. at 363-64. It had nothing to do with a choice-of-law determination. That a rule is "grounded in policy concerns" or "addresses policy concerns," as the *Ward* decision states, *see id.* at 372, and as the State of California's *amicus* brief in that litigation supports, *see* Docket No. 25, at 7:28-8:3, does not necessarily equate to a fundamental public policy of the State of California for choice-of-law purposes.[9] *Campbell* is of similar limited guidance on this particular point; it too spoke only generically of "the public policy of this state," and not in the context of a choice-of-law determination. *See Campbell v. Allstate Ins. Co.*, 60 Cal.2d 303, 307 (1963).

Insurance Co. of State of Pennsylvania simply sets forth the California notice-prejudice rule, *see* 922 F.2d at 523, and, citing *Bollinger v. National Fire Insurance Co.*, 25 Cal.2d 399, 405 (1944), "not[es] California's strong public policy against 'technical forfeitures," 922 F.2d at 524. *But see* Footnote 9, *supra*. But *Bollinger* also had nothing to do with any choice-of-law analysis, let alone one involving an agreed-to choice-of-law provision, nor did it ever use the phrase "fundamental," "strong" or any "policy" or "policies" of the State of California in this regard. *Service Management Systems*, which is not citable as precedent, *see* Ninth Cir. R. 36-3(a), repeats the "strong public policy" characterization, *see* 216 Fed. Appx. at 664, but again does so *not* in the context of any choice-of-law determination. Although *Steadfast Insurance* (a New York decision) analyzed the notice-prejudice rule under California law and repeated the "strong public policy" mantra, the decision offers no explanation for why California law was implicated

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[8] One California court has rejected the view that Civil Code section 3275 represents a "fundamental policy" of California, at least in the context of forfeitures related to licensing agreements. *See CQL Original Prods., Inc. v. Nat'l Hockey League Players' Ass'n*, 39 Cal.App.4th 1347, 1355-57 (1995).

[9] In fact, that decision cited a then-recent California Supreme Court decision (though one not involving insurance) that had enforced a condition precedent despite the fact that there had been no allegation of prejudice due to the plaintiff's lapse. *See Ward*, 526 U.S. at 370 (discussing *Platt Pac. Inc. v. Andelson*, 6 Cal.4th 307 (1993) (en banc)).

in that case, whether because the insurance policy in question called for application of California law or whether it instead established primacy by way of a choice-of-law determination. *See* 837 N.Y.S.2d at 120-21.

In the absence of case law supporting the view that the notice-prejudice rule is a fundamental public policy of the State of California within the meaning of that concept as it is employed in a choice-of-law determination (and perhaps especially such a determination where the parties have freely-agreed in a binding contract to application of another state's laws), the Court is not inclined to conclude that California law applies here. The law the parties chose in the Policy – New York law – applies.

3. Application of New York Law to the Notice Provision

There is no triable issue of fact with respect to whether Plaintiff complied with the "condition precedent" to coverage that it notify Defendant "of the particulars with respect to the time, place and circumstances" of the "Pollution Condition," nor is there any triable issue of fact with respect to whether it furnished to Defendant "a written report as soon as practicable," considering that the first notice it did eventually provide was oral notice. *See* DR ¶¶ 1-2, 7-8, 10-11, 26-28, 35, 50, 53, 58, 67. Plaintiff did not actually give Defendant notice of the "Pollution Condition" until approximately six months after it first discovered it, approximately three months after remediation of the "Pollution Condition" was *complete*, and after it had incurred *all* of the remediation-related expenses it sought to recover from Defendant. *See id.*

Plaintiff offers several excuses for its nonperformance. Those excuses cannot save it here. Even if Plaintiff were able to somehow demonstrate that it was justifiably ignorant of the scope of coverage available under the Policy (a seriously doubtful proposition in itself, *see* DR ¶¶ 13-15, 17-21, 25, 29-31, 62-63, 65), it would have to demonstrate "reasonably diligent efforts to ascertain whether coverage existed." *Mt. Vernon Fire Ins. Co. v. Abesol Realty Corp.*, 288 F.Supp.2d 302, 314 (E.D.N.Y. 2003) (quoting *Winstead v. Uniondale Union Free Sch. Dist.*, 608 N.Y.S.2d 487, 489 (N.Y. App. Div. 1994)). Given Plaintiff's institutional status, its possession of the Policy, its institutional knowledge of the Policy's terms, and the amount of time it took for its responsible personnel to even *investigate* the scope of the Policy's coverage, the Court concludes that there is no triable issue of fact here on that point, or at least not one where

a rational factfinder could find in Plaintiff's favor. *See Matsushita*, 475 U.S. at 587.

Plaintiff also attempts to rely upon New York Insurance Statute § 3420's requirement for a prejudice showing in the late-notice setting. See N.Y. Ins. Law § 3420(a)(5) (requiring the inclusion in certain insurance contracts of "[a] provision that failure to give any notice required to be given by such policy within the time prescribed therein shall not invalidate any claim made by the insured, injured person or any other claimant, unless the failure to provide timely notice has prejudiced the insurer"). But, as Defendant argues, that statute does not apply here under its plain language. *See id.* § 3420 (indicating the statute's limitation to insurance policies/contracts "issued or delivered in this state"); *Indian Harbor Ins. Co. v. City of San Diego*, 972 F.Supp.2d 634, 648 (S.D.N.Y. 2013); *Rockland Exposition, Inc. v. Great Am. Assurance Co.*, 746 F.Supp.2d 528, 533 n.6 (S.D.N.Y. 2010), *aff'd*, 445 Fed. Appx. 387 (2d Cir. Nov. 2, 2011); *see also* DR ¶ 49. Although Plaintiff argues that any limitation of section 3420(a)(5)'s applicability to policies "issued or delivered in" New York would be unconstitutional as violating the Privileges and Immunities Clause of the United States Constitution because it would, according to Plaintiff, discriminate against non-New York *residents*, Plaintiff has pointed to *nothing* in section 3420 that indicates any effect on its application as a result of *residence*. Moreover, Defendant correctly notes that the United States Constitution's Privileges and Immunities Clause does not apply to corporations such as Plaintiff. *See Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936); *Merrifield v. Lockyer*, 547 F.3d 978, 980 n.1 (9th Cir. 2008); *Shell Oil Co. v. City of Santa Monica*, 830 F.2d 1052, 1058 n.7 (9th Cir. 1987); *see also* FAC ¶ 2. Beyond all this, of course, Plaintiff *freely entered into* the Policy which, *on its face*, provides for application of New York law, presumably aware of the fact that the Policy would not be "issued or delivered" in New York.

Plaintiff's late notice bars its claim under New York law, irrespective of whether Defendant would be able to demonstrate prejudice. *See Argo Corp. v. Greater N.Y. Mut. Ins. Co.*, 4 N.Y.3d 332, 339 (N.Y. 2005) ("For years the rule in New York has been that where a contract of primary insurance requires notice 'as soon as practicable' after an occurrence, the absence of timely notice of an occurrence is a failure to comply with a condition precedent which, as a matter of law, vitiates the contract. No showing of

prejudice is required.") (omitting internal citation); *id.* at 339-40 (confirming that *Matter of Brandon (Nationwide Mut. Ins. Co.)*, 97 N.Y.2d 491 (N.Y. 2002) "did not abrogate the no-prejudice rule and should not be extended to cases where the carrier received unreasonably late notice of a claim").[10] Plaintiff's arguments for why an exception to New York's no-prejudice-required rule should apply here, or for why the "issued and delivered" limitation in section 3420 is an unwise one, are better-directed to the New York state legislature in the absence of a New York Court of Appeals decision that creates such an exception notwithstanding that highest court in New York's confirmed-vitality of the rule as recently as 2005 in *Argo*, and again in 2008. *See also Briggs Ave. LLC v. Ins. Corp. of Hannover*, 11 N.Y.3d 377, 381-82 (N.Y. 2008) (applying no-prejudice rule again, even while acknowledging that the legislature had enacted what would become the then-not-yet-effective section 3420(a)(5)). Because Plaintiff cannot demonstrate performance or any excuse for its nonperformance, it cannot maintain its breach of contract claim. Because it cannot maintain its breach of contract claim, it cannot prevail in connection with its claim for declaratory relief. As such, Defendant is entitled to summary judgment in its favor.[11]

4. Application of the Consent/Emergency Provision

Even assuming Defendant could not prevail on this motion under power of the Notice Provision, there is no triable issue of fact with respect to Plaintiff's non-compliance with the Consent/Emergency Provision either. As noted above, Plaintiff had actually *incurred all* of its remediation-related expenses *before* it gave Defendant *notice* of the "Pollution Condition," meaning that it obviously never obtained Defendant's

[10] As Defendant notes in its motion, the six-month delay in notice falls comfortably within the temporal scope of delays that New York courts have found to be late notice as a matter of law. *See* Docket No. 21-1, at 13:7-19; *see also Am. Ins. Co. v. Fairchild Indus., Inc.*, 56 F.3d 435, 440 (2d Cir. 1995) ("Under New York law, delays for one or two months are routinely held 'unreasonable.'").

[11] Plaintiff's last argument for why its failure to comply with the Notice Provision would not bar its action here and its rights under the Policy is that Defendant did not rely on the Notice Provision until it formally denied coverage in March 2012, and that Plaintiff was prejudiced thereby due to its inability at that late date to bring an action for civil penalties under California Health and Safety Code § 25249.7. Under these circumstances, Plaintiff asserts that Defendant would be equitably estopped from relying on the Notice Provision. Even if the Court were to conclude that Plaintiff was entirely correct in those assertions (and ignore the fact that Defendant's August 10, 2011, acknowledgment letter, asking – among other things – whether Plaintiff sought coverage, was met with *silence* from Plaintiff), as discussed *infra* the Consent/Emergency Provision would *still* bar Plaintiff's rights.

written consent. Defendant had a right under the Policy to determine whether or not it would give such written consent, cabined only by the limitation that such consent could not be "unreasonably withheld" (with no other "excuses" built into the policy language *to which the parties agreed* and no language suggesting that the provision only applies to certain types of claims under the Policy). Plaintiff's actions deprived Defendant of that contractual right in total. Here too, prejudice is not a necessary demonstration, and this failure bars Plaintiff's claim as well. *See Vigilant Ins. Co. v. Bear Stearns Cos., Inc.*, 10 N.Y.3d 170, 177-78 (N.Y. 2008); *N.Y. Cent. Mut. Fire Ins. Co. v. Danaher*, 290 A.D.2d 783, 784-85 (N.Y. App. Div. 2002).[12]

Although Plaintiff insists that the costs it incurred were emergency costs, it cannot dispute that the remediation costs were incurred over a period of two-three months, during which its representatives *unquestionably* had enough time to communicate with Defendant in order to obtain its consent, or at least to start the ball rolling in that regard.[13] *See Jamestown Builders, Inc. v. Gen. Star Indem. Co.*, 77 Cal.App.4th 341, 348-49 (1999) (noting, under California law: "On its face the complaint shows that Jamestown had ample time to review the policy, investigate the claims, and tender them to General Star. Neither time nor events stopped Jamestown from tendering its defense to General Star before spending some $1,240,000 in settlements."). Moreover, even assuming the expenses were incurred "on an emergency basis," Plaintiff would have then been obligated, under the policy language to which it agreed, to "notify [Defendant]

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[12] Unlike with respect to the Notice Provision, Plaintiff has not demonstrated that California law requires a demonstration of prejudice with respect to a failure under a Consent Provision. *See Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherunges A.*, 3 Cal.3d 434, 448-49 (1970); *cf. Jamestown Builders, Inc. v. Gen. Star Indem. Co.*, 77 Cal.App.4th 341, 346 (1999) ("California law enforces…no-voluntary-payments provisions in the absence of economic necessity, insurer breach, or other extraordinary circumstances."); Croskey & Heeseman, California Practice Guide: Insurance Litigation (2012) § 3:170.7, at 3-56 ("The voluntary payment provision is not subject to the notice-prejudice rule."). Although Plaintiff perceives a distinction between first-party and third-party claims, as discussed above there is no such limitation in the plain terms of the Consent/Emergency Provision in the Policy, a provision to which Plaintiff willingly agreed. There is, therefore, no argument to be had that anything other than New York law – selected by the parties in their agreement – governs this issue. Any potential excuses Plaintiff thinks it might have under California law in order to avoid the effect of this failure are, therefore, irrelevant.

[13] Had Plaintiff provided Defendant with notice of the "Pollution Condition" and incurred some (or, perhaps, even all) of the remediation expenses while it was waiting to hear back from Defendant, application of the "emergency basis" clause of the Consent/Emergency Provision might have been a closer question. Those are not the facts of this case, however.

immediately []after" "such emergency occurs." Again, Defendant did not even *learn* of the Pollution Condition from Plaintiff until approximately three months after remediation was *complete*.

Finally, with respect to Plaintiff's argument that its remediation expenses/payments were not "voluntary," *see* Docket No. 25, at 28:18-29:20,[14] the Court initially questions what role such an exception can have in a policy such as the instant one, which contains an exception for emergency payments and does not contain the term "voluntary" or any variant thereof. *None* of the cases Plaintiff cites appear to include any consent provision with an "emergency" loophole. Beyond that, the Court's review of the decisions Plaintiff relies upon in this regard – both New York and California cases – demonstrates to the Court's satisfaction that the facts present in those case are distinct from those at issue here, even considered at the summary judgment stage, such that any such exception is not applicable here. *See Smart Style Indus., Inc. v. Pa. Gen. Ins. Co.*, 930 F.Supp.159, 164 (S.D.N.Y. 1996) (concluding that payments to retained counsel were not voluntary where insured "had to proceed with its defense" of counterclaims); *N. Ins. Co. of N.Y. v. Allied Mut. Ins. Co.*, 955 F.2d 1353, 1360 (9th Cir. 1992) (concluding that costs were incurred voluntarily because "[t]his was not an instance in which the defense had to begin before the insured had time to identify the insurer and then tender the defense"); *Shell Oil Co. v. Nat'l Union Fire Ins. Co.*, 44 Cal.App.4th 1633, 1648-49 (1996) (finding payments involuntary where plaintiff was additional insured on policy procured by unaffiliated third party such that plaintiff did not have immediate access to policies in question); *Fiorito v. Superior Court (State Farm Fire & Cas. Co.)*, 226 Cal.App.3d 433, 438-39 (1990) (reversing order sustaining demurrer where insureds retained counsel "to take actions necessary to protect their legal interests upon being sued," including "respond[ing] to legal process"); *see also Matsushita*, 475 U.S. at 587.

In sum, even if the Notice Provision would not provide Defendant with a complete defense in this action, the Consent/Emergency Provision does.

E. Conclusion

Defendant is entitled to summary judgment in its favor.

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[14] Defendant does not appear to have responded to this argument or to any of the cases Plaintiff cited in support thereof. The Court would inquire with it at the hearing why it has not done so (or if the Court is incorrect in this assessment of Defendant's responsive arguments).