At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of August, 2019.

P R E S E N T:
HON. CARL J. LANDICINO,
Justice.

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REPWEST INSURANCE COMPANY, formerly known as Western Insurance Company, U-HAUL CO. OF ARIZONA, and U-HAUL CO. OF NEW YORK AND VERMONT, INC.,

Plaintiff,

- against -

RANDY P. RICHARDSON,

Defendant,

ANTOINE M. JOHNSON, PIERRE THOMAS, BOBBY A. WAGNER, MICHAEL SERRANT, and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Nominal Defendants.

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Index No.: 510785/2015

DECISION AND ORDER

Motion Sequence #4, #5 & #6

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	1/2, 3/4, 5/6
Opposing Affidavits (Affirmations)	7
Reply Affidavits (Affirmations)	8, 9, 10

Upon the foregoing papers, and after oral argument, the Court finds as follows:

The instant Declaratory Judgment action stems from a related action captioned, *Antoine M. Johnson, Pierre Thomas, Bobby A. Wagner and Michael Serrant v. Randy P. Richardson and U-Haul Company of Arizona*, Index No. 22493/2010 ("the Underlying Action"). The Underlying

Action is currently stayed pending resolution of this Declaratory Judgment action, pursuant to Order dated March 15, 2016 (Honorable Larry D. Martin, J.S.C.).

The Underlying Action and the instant Declaratory Judgment action relate to an automobile accident which allegedly occurred on March 24, 2010 on Bedford Avenue, at or near the intersection of Brevoort Place in Brooklyn, New York. It is alleged by the Plaintiffs in the Underlying Action (nominal defendants in the instant action) (hereinafter "Nominal Defendants" or collectively "Moving Defendants")[1], that a U-Haul vehicle leased and operated by Defendant Randy P. Richardson (hereinafter "Defendant Richardson") rear-ended a vehicle operated by Nominal Defendant Antonoine M. Johnson (hereinafter "Nominal Defendant Johnson") in which Nominal Defendants, Pierre Thomas ("Nominal Defendant Thomas"), Bobby A. Wagner ("Nominal Defendant Wagner") and Michael Serrant ("Nominal Defendant Serrant") were passengers. In the Underlying Action the Plaintiffs are seeking damages for personal injuries allegedly sustained as a consequence of the accident of March 24, 2010.

In the instant action, Nominal Defendant Johnson moves (Motion Seq. #4), Nominal Defendants Thomas, Wagner and Serrant cross-move (collectively "Nominal Defendant Passengers") (Motion Seq. #5) and Nominal Defendant State Farm Mutual Automobile Insurance Company cross-moves ("Nominal Defendant State Farm") (Motion Seq. #6) for an Order pursuant to CPLR 3212, granting summary judgment in favor of the Defendant Richardson and all Nominal Defendants. Additionally, the Nominal Defendant Passengers also seek an Order pursuant to 3215(c) dismissing all claims against Defendant Richardson and all Nominal Defendants in that the Plaintiff has allegedly failed to obtain a default judgment against Defendant Richardson within one year of the purported service of the Summons and Complaint (Motion Seq. #5). Defendant Richardson ("Defendant Richardson" or "Insured") has apparently not appeared in this action.

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[1]Nominal Defendant State Farm is not a party in the Underlying Action.

All Nominal Defendants aver that the Plaintiff, Repwest Insurance Company's ("Repwest") disclaimer of coverage as to Defendant Richardson is untimely pursuant to Insurance Law §3420(d). The letter by which Repwest sought to disclaim coverage is dated June 25, 2015 ("Disclaim Letter"), some five years after the date of accident (March 24, 2010) (Nominal Defendant Johnson, Exhibit "E") Further, the Moving Defendants claim that there was a lack of diligent effort on the part of Repwest to obtain cooperation from Defendant Richardson. Further, the Moving Defendants argue that this lack of diligent effort prevents Plaintiff from establishing that Defendant Richardson's alleged lack of cooperation is willful. Plaintiffs oppose the instant motions and contend that the disclaimer is reasonable and they are afforded, as insurer, a longer period of time to disclaim, when it is not clear that further attempts would be futile in gaining the cooperation of the insured. Additionally, the Plaintiffs claim that there were sufficient attempts to contact and receive cooperation from Defendant Richardson and that, in any event, because the Nominal Defendants disagree, a material question of fact exists.

"Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the

action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

In support of the motions, Nominal Defendant Johnson provides evidence of Repwests's communication, or attempts, to contact the Insured (Exhibits "O", "P" and "Q"). Most of these attempts constitute letters from Repwest to the Defendant Richardson, at his last known address. Nominal Defendant Johnson also contends that all of the evidence provided by the Plaintiffs, as Defendants in the Underlying Action, and in support of the Motion to withdraw as counsel to Defendant Richardson in the Underlying Action (Nominal Defendant Johnson, Exhibit "O") are hearsay and inadmissable, in that no legal foundation is provided. However, the subject letters [as provided by Nominal Defendant Johnson] were dated: February 2, 2011, April 18, 2011, May 11, 2011, May 10, 2012, July 27, 2012, April 30, 2014, September 22, 2014, January 12, 2015, and June 3, 2015 (9 Letters). The Disclaimer Letter was dated June 25, 2015. All of these letters were purported to have been sent by certified mail and regular mail (Affirmation in Support of Motion to Withdraw as Counsel to Defendant Richardson in the Underlying Action). The address utilized was as allegedly provided by the Defendant Richardson on the rental/insurance agreement with Plaintiff U-Haul.

In opposition, Plaintiffs by Affidavit of Karen Burczeweski, a claims adjuster for the Plaintiff ("Claims Adjuster"), point to what Plaintiffs contend were good faith and diligent attempts to locate and obtain Defendant Richardson's cooperation. (Plaintiffs' Opposition Exhibit "4") The Claims Adjuster indicates that Joseph Lupo ("Lupo") worked as a Investigative Associate on the matter and attempted several times to contact Defendant Richardson, in person and by telephone. These calls were apparently made in September and December of 2011.

Plaintiffs further represent that Lupo was advised to make efforts again in April of 2014. (Plaintiffs' Opposition Exhibit "4")

However, the Plaintiffs have failed to provide good cause to disclaim coverage by letter dated June 25, 2015. Under the circumstances presented in their entirety Repwest's attempt to disclaim is untimely as a matter of law. Generally, the burden is on the insurer to explain the delay in disclaiming and "failure by the insurer to give [notice of disclaimer] as soon as reasonably possible after it first learns of the accident or of grounds for disclaimer of liability or denial of coverage, precludes effective disclaimer or denial." *Wasserheit v. New York Cent. Mut. Fire Ins. Co.*, 271 A.D.2d 439, 705 N.Y.S.2d 638 (2d Dept, 2010) quoting *Harford Ins. Co. v. County of Nassau*, 46 N.Y.2d 1028, 389 N.E.2d 1061 (1979). Additionally, the burden is on the insurance company to "establish that the delay was reasonably related to the completion of necessary, thorough, and diligent investigation." *Okumus v. National Specialty Ins. Co.*, 112 A.D.3d 797, 977 N.Y.S.2d 338 (2d Dept, 2013), see, *Quincy Mut. Fire Ins. v. Uribe*, 45 A.D.3d 611, 845 N.Y.S.2d 434 (2d Dept, 2007). The Plaintiffs were certainly aware of the claim as early as January 26, 2011, when an Answer to the Complaint was interposed in the Underlying Action. From that date (January 26, 2011) to the date of the Disclaimer Letter (June 25, 2015), more than four years had passed, and the Plaintiffs have failed to show that there is any reasonable explanation for this delay.

See, *Wasserheit v. New York Cent. Mut. Fire Ins. Co.*, 271 A.D.2d 439, 705 N.Y.S.2d 638 (2d Dept, 2010) [Four months from notice of the claim without any explantion offered by the Insurer was unreasonable as a matter of law]; *State Farm Mut. Auto. Ins. Co. v. Cote*, 200 A.D.2d 622, 606 N.Y.S.2d 721 (2d Dept, 1994) [Petitioner's unexplained delay of seven months from commencement of the proceeding, without adequate reason, when the insurer is aware of sufficient facts to disclaim coverage, was unreasonable as a matter of law and the Insurer was precluded from disclaiming coverage]; *New York City Hous. Auth. v. Underwriters at Lloyd's London*, 61 A.D.3d 726, 877 N.Y.S.2d 193 (2d Dept, 2009) [The insurer was obligated to

defend, as it did not disclaim coverage until three months after they received the notice of the claim and failed to establish that there was a need for an investigation or that one was conducted diligently]; *Robinson v. Global Liberty Ins. Co. of N.Y.*, 164 A.D.3d 1385, 84 N.Y.S.3d 255 (2d Dept, 2018) [After diligent investigation, a period of 5 months from sufficient notice that there would be no cooperation, was insufficient, as a matter of law to permit disclaimer].

The Plaintiffs rely on *Continental Casualty Company v. Terrance D. Stradford*. That matter is distinguishable in many ways. In *Continental*, the Court of Appeals found that a two month period of delay in disclaiming was reasonable, as a matter of law, because the Insured had made "...sporadic cooperation or promises to cooperate...". Additionally, the Court of Appeals also took into consideration that the Insurer during that two month period was making diligent attempts to "analyze the pattern of obstructive conduct that permeated the insurer's relationship with its insured for almost six years." *Continental Cas. Co. v. Stradford*, 11 N.Y.3d 443, 900 N.E.2d 144 (2008). In the instant matter the Plaintiffs have not shown diligent attempts over the five year period and no relationship was present. By Plaintiffs' own admission Defendant Richardson made no response. No diligent attempts were made and the attempts that were made bore no fruit. There was no reasonable expectation to believe that Defendant Richardson was going to cooperate. There were sufficient number of undisputed facts acknowledged by Plaintiffs to establish that the attempted disclaimer was untimely as a matter of law. Accordingly, the Plaintiff has failed to raise an issue of fact as to the timeliness of the Disclaimer Letter and all the motions are granted.

Based on the foregoing, it is hereby ORDERED as follows:

Nominal Defendant Johnson's motion for summary judgment pursuant to CPLR 3212 (motion seq. #4) is granted.

Nominal Defendants Thomas, Wagner and Serrant's motion for summary judgment pursuant to CPLR 3212 (motion seq. #5) is granted. As to the relief sought pursuant to 3215(c) dismissing all claims against Defendant Richardson and all Nominal Defendants is deemed moot in light of this Courts decision.

Nominal Defendant State Farm's motion for summary judgment pursuant to CPLR 3212 (motion seq. #6) is granted.

Plaintiffs' action for a declaratory judgment is dismissed and the disclaimer is null and void.

Settle Judgment on notice, together with Notice of Entry of this Decision and Order, within 30 days of entry.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.