SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN, J.S.C. PART 57
Justice

City
Michigan Mut. Co. NY

INDEX NO. 400772-2000

MOTION DATE

MOTION SEQ. NO. 02

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for Summary Judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... Notice of Cross-Motion	PAPER NUMBERED 1 2
Answering Affidavits — Exhibits	3
Replying Affidavits Memo of Law in Opp. (Ltr)	4

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is granted and cross-motion is denied per accompanying decision order dated 4/8/02

SCANNED APR 15 2002

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 4/8/02

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

[* 1]

Duplicate Original
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

Index No. 400772/00

THE CITY OF NEW YORK,

Plaintiff,

-against-

DECISION/ORDER

MICHIGAN MUTUAL COMPANY
OF NEW YORK,

Defendant.

In this declaratory judgment action, plaintiff City of New York seeks summary judgment against defendant Michigan Mutual Insurance Co., sued as Michigan Mutual Co. of New York ("Michigan Mutual"), declaring that Michigan Mutual is liable for settlement costs and attorney's fees incurred by the City in a personal injury action brought against the City for injuries sustained by an employee of the City's contractor at a construction site. Defendant Michigan Mutual cross-moves for summary judgment declaring that it has no duty to indemnify or defend plaintiff For the purposes of this decision and order, the court consolidates a second motion brought by defendant to vacate the note of issue and a cross-motion by the City for costs pursuant to 22 NYCRR §130-1.1.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v. City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v. New York Univ. Med. Ctr., 64 NY2d

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851,853[19851.) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b]." (Zuckerman v. City of New York, supra, at 562.)

The City seeks summary judgment on the ground that Michigan Mutual did not disclaim coverage to the City as an additional insured under a policy between Michigan Mutual and Marcantonio and Buzzetta Construction Corp. ("M&B"), the City's contractor. Michigan Mutual contends that the City's right to indemnification and a defense is barred by waiver, estoppel or laches.

The following facts are uncontested. On October 30, 1989, an M&B employee was injured during the course of his employment. In 1991, this employee, Antonio Rodriguez, filed an action (hereafter "Rodriguez action" or "employee action") against the City for damages for his injuries. By letter dated July 5, 1994, the City informed Michigan Mutual of that action, and demanded that Michigan Mutual defend and indemnify the City by virtue of its status as a named insured under a policy between M&B and Michigan Mutual. By letter dated July 28, 1994, Michigan Mutual requested that the City furnish Michigan Mutual with a copy of the contract between the City and M&B. The City did not respond to this letter and did not provide the contract. The City settled the M&B employee's action against it for $850,000 in October 1995.

It is further uncontested that the policy endorsement between M&B and Michigan Mutual provides that the Commissioner of Environmental Protection is an additional insured. The endorsement's section E reads in part: "With reference to Project MED568 the Commissioner of the Department of Environmental Protection *** is an additional insured as their interests may appear."

The City contends that Michigan Mutual unreasonably delayed in giving notice of disclaimer to the City. Michigan Mutual does not dispute that it failed to provide a notice of disclaimer. Rather, it argues that because the City did not provide the requested copy of the underlying contract between the City and M&B, it was "unable to determine what, if any, obligations Michigan Mutual had pursuant to the policy endorsement." (Aff. of Wayne Andreae In Support of Cross-Motion, ¶10.)

Notices of disclaimer for policies covering death or bodily injury are governed by Insurance Law 3420(d).[1] It is well-settled that "failure by the insurer to give written notice of disclaimer based on an exclusion or failure to comply with a policy condition as soon as is reasonably possible renders the disclaimer ineffective." (Columbia Cas. Co. v. Natl. Emergency Servs., Inc., 282 AD2d 346,347 [1st Dept 20011; Hartford Ins. Co. v. County of Nassau, 46 NY2d 1028[1979], rearg denied 47 NY2d 95.)

Here, Michigan Mutual does not deny that it received notice of the action in 1994. Nor does it deny that it failed to provide the City with a notice of disclaimer. Assuming arguendo that the City's failure to respond to Michigan Mutual's request for a copy of the contract was a reasonable ground on which to disclaim coverage, Michigan Mutual had a duty to disclaim within a reasonable period of time after the City's failure to respond. (Cf., Jefferson Ins. Co. v. Travelers Indem. Co., 92 NY2d 363,370 [1998]["[W]here some ambiguity is present regarding the extent of coverage or any possible exclusions, the insurer must timely disclaim"]; Planet Ins.

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[1] Insurance Law § 3420(d) provides as follows:
If under a liability policy delivered or issued for delivery in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.

Co. v. Bright Bay Classic Vehicles, Inc., 75 NY2d 394 [19901, rearg denied 76 NY2d 773.) Michigan Mutual's delay in disclaiming, and indeed, wholesale failure to disclaim, is thus unreasonable as a matter of law.

Michigan Mutual emphasizes the City's failure to provide timely notice. of claim. However, the requirement for timely disclaimer "applies even where, as here, the insured failed to provide the carrier with timely notice of the claim in the first instance." Wasserheit v. New York Cent. Mut. Fire Ins. Co., 271 AD2d 439,440 [2nd Dept 20001.)

Significantly, Michigan Mutual does not address its failure to disclaim but, rather, focuses on the City's delay in seeking coverage and on its failure to provide Michigan Mutual with a copy of the contract. However, Michigan Mutual fails to cite any authority for its implicit contention that its obligation to defend and indemnify can be determined under the general doctrines of waiver, estoppel or laches, and without reference to its failure to satisfy its duty to disclaim under Insurance Law § 3420(d).

The court accordingly holds that the City has demonstrated as a matter of law that Michigan Mutual was obligated to defend and indemnify the City in the Rodriguez action. The remaining issue is whether a hearing is required as to the reasonableness of the damages that the City requests - namely, the $850,000 settlement amount with interest; costs of the action; and attorney's fees.

" 'The New York rule is that where an insurer ' "unjustifiably refuses to defend a suit, the insured may make a reasonable settlement or compromise of the injured party's claim, and is then entitled to reimbursement from the insurer." ' " (Ansonia Assocs. Ltd. Partnership v. Public Svc. Mut. Ins. Co., 257 AD2d 84, 86 [1st Dept 19991 [quoting Rosen & Sons v. Security Mut.

Ins. Co., 31 NY2d 342,347 [1972].)

On this record, the City does not set forth any facts to demonstrate that the $850,000 settlement was reasonable under the circumstances. The insurer is accordingly entitled to a trial as to the reasonableness of the amount paid for the settlement. (See, Atlantic Cement Co. v. Fidelity & Cas. Co. of New York, 63 NY2d 798 [1984], affg 91 AD2d 412; Lumbermens Mut. Ins. Co. v. Lumber Mut. Ins. Co., 148 AD2d 328 [1st Dept 19891.)

Similarly, while the City is entitled to costs and attorney's fees expended in the defense and settlement of the underlying action (see, Muhlstock & Co. v. Amer. Home Assur. Co., 117 AD2d 117 [1st Dept 1986]), the record does not establish the reasonableness of the attorney's fees, which must also be determined at trial.

Finally, entry of summary judgment is not barred by Michigan Mutual's separate motion, made after service of the City's summary judgment motion, to strike plaintiffs note of issue. This separate motion fails to show that any further discovery is needed to oppose the summary judgment motion.

As of November 8,2001, when this court conducted an in camera review of requested documents, Michigan Mutual's only remaining request was for an unserved, draft document entitled "Notice of Vouching-In," dated October 10, 1995, which offered Michigan Mutual an opportunity to defend the employee action against the City. The City contends that this document is attorney work product and therefore privileged.[2] The court need not reach this issue, as the document is in any event irrelevant to the liability issues in this case. Michigan Mutual

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*Notwithstanding this claim of privilege, the City had shown this document to Michigan Mutual **prior** *to* the ~~in camera~~ review.

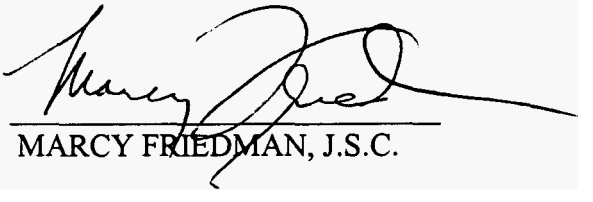
acknowledges that it received a notice of claim apprising it of the Rodriguez action, in 1994. Moreover, it makes no showing that its duty to disclaim was in any way affected by the City's failure to serve a further notice in 1995, offering it the opportunity to defend that action. On the contrary, it is "well settled that the vouching-in process imposes no obligation to defend." (Location Auto Leasing Corn. **v.** Lembo Corn., 62 Misc 2d 856, 858 [Sup Ct, Nassau County 19701.)

It is accordingly hereby ordered as follows: Plaintiff City of New York's motion for summary judgment is granted to the following extent: Plaintiff is granted partial summary judgment as to liability. Plaintiffs damages shall be assessed at a trial. Defendant Michigan Mutual's cross-motion for summary judgment is denied. The Clerk shall enter judgment accordingly.

Defendant Michigan Mutual's motion to strike the note of issue is denied. Plaintiffs cross-motion for sanctions is denied as without merit.

This constitutes the decision and order of the court.

Dated: New York, New York
April 8, 2002



MARCY FRIEDMAN, J.S.C.