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

HON. LOUISE GRUNER GANS

PRESENT: PART 61

0603405/2001

CENTURY INDEMNITY CO.
vs
KEYSPAN CORP.

SEQ 3

PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SCANNED
JUL 22 2003

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is determined per
annexed decision and order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 6/24/03

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : IAS PART **61**

----------X

CENTURY INDEMNITY COMPANY,

Plaintiff

-against-

Index No. 603405/01
Action No. **1**

BROOKLYN UNION GAS COMPANY, et al.,

Defendants.

----------X

BROOKLYN UNION GAS COMPANY,

Plaintiff,

-against-

Index No. 403087/02
Action No. 2

CENTURY INDEMNITY COMPANY; CERTAIN UNDERWRITERS OF LLOYD'S LONDON and LONDON MARKET INSURANCE COMPANIES; and HOME INSURANCE COMPANY,

Defendants.

----------X

LOUISE GRTJNER GANS, J.:

Century Indemnity Company (Century), which is plaintiff in Action No. 1 and defendant in Action No. 2, moves for an order granting it partial summary judgment on the third cause *of* action in the Third Amended Complaint of Brooklyn Union Gas (Brooklyn Union), which is the plaintiff in Action No. 2 and defendant in Action No. 1.

These actions involve insurance claims made by Brooklyn Union, pursuant to policies issued by Century and other insurance companies, in connection with its environmental liabilities arising from a number of manufactured gas plant (MGP) sites.

In Action No. 1, Century seeks a declaratory judgment that it has no obligation to indemnify Brooklyn Union for its cost incurred and expected to be incurred in connection with the

defense, investigation and remediation of environmental contamination of the **MGP** sites. In Action No. *2*, Brooklyn Union seeks, among other things, a declaratory judgment that its costs are covered under the insurance policies issued by Century. In the third cause of action in its Third Amended Complaint, Brooklyn Union alleges that Century breached the terms of its insurance contracts in the following respects:

> (a) Defendants have failed reasonably and promptly to respond to, and have failed to investigate, Brooklyn Union's demand for defense costs and liability payments for the required investigation and cleanup associated with the MGP Sites;
>
> (b) Defendants have failed and/or refused to indemnify Brooklyn Union for, or pay any of, Brooklyn Union's defense costs in connection with the investigation associated with the MGP Sites;
>
> (c) Defendants have failed and/or refused to indemnify Brooklyn Union for, or pay any of, Brooklyn Union's liability in connection with the required cleanup associated with the MGP Sites; and
>
> (d) Defendant Century Indemnity has failed to respond timely to Brooklyn Union's demands for coverage. On information and belief, Century Indemnity similarly has failed to respond timely to other policyholders' demands for coverage at least since the time that Century Indemnity was acquired by ACE INA Holdings, Inc.

Action No. 2, Third Amended Complaint, ¶ 64.

Although Century's motion does not specify, it appears from the reply brief submitted by Century, that the motion only addresses subsection (d) of Brooklyn Union's third cause of action.

Submitting a series of letters sent by, or on behalf of, Century to Brooklyn Union or its counsel, dated March 17, 1993,

October 19, 1993, July 8, 1994, August 19, 1994, and August 25, 1994, Century contends that on numerous occasions it notified Brooklyn Union that it had no obligation to indemnify Brooklyn Union until the underlying primary insurance and self-insured retentions had been exhausted, and requested information relevant to that matter. According to Century, Brooklyn Union had not provided such information as of June 30, 1998, when Century and Brooklyn Union executed a Standstill Agreement to enable the parties to reach a negotiated settlement of their dispute. Century also contends that it repeatedly raised a series of substantive issues with Brooklyn Union regarding its obligations under the policies, such as pollution exclusion clauses, and other defenses. Century also contends that Suzanne Gray, an environmental investigator for Century, undertook to investigate Brooklyn Union's claim. According to Century, for these reasons, the court should find that Century did not fail *to* respond in a timely manner to Brooklyn Union's request for coverage, and should grant partial summary judgment in Century's favor on Brooklyn Union's third cause of action in its Third Amended Complaint.

Citing *Ray* ***v Hertz*** *Corp.* (182 Misc 2d 274 [Sup Ct, NY County 1999]), Brooklyn Union first argues that Century may not seek summary judgment with respect to only certain allegations in its third cause of action. However, the court in *Ray* merely holds that partial summary judgment is not available as to separate items of damages, such as damages for future earnings. Here, in

contrast, .BrooklynUnion's third cause of asserts the different aspects of Brooklyn Union's breach of contract claim against Century, not different elements of damages. There is no conceptual reason why Century cannot seek partial summary judgment with respect to different aspects of that claim.

With respect to the question of whether its self-insured retentions had been exhausted, at oral argument on Century's motion, with the permission of the court, Brooklyn Union submitted evidence to the court to show that in **1995**, Century knew that Brooklyn Union had spent $4 million *on* the Coney Island site and was facing a **$34** million clean-up, and that, therefore, Century knew that the $100,000 self-insured retentions had been exhausted. Century argues, however, that under the recent case of ***Consolidated Edison Co. of New York v Allstate Ins. Co.*** (98 NY2d 208 [2002]), Brooklyn Union's costs must be pro-rated over the period of time that the alleged property damage took place, and given that most, if not all, of the property damage occurred many years before Century's first excess policy was issued to Brooklyn, the damage might not even have occurred during the policy period. According to Century, even if some **of** the damage did occur during the period after the first policy was issued, under the ***Con Edison*** decision, Brooklyn Union's costs would have to be pro-rated over the period of time that the damage took place, and, therefore, the self-insured retentions under each excess policy might not have been met.

While it is true that the Court of Appeals in *Con Edison* concluded that, under the policies at issue in that case, there should be a pro rata allocation of the insured's expenses both among the policies and over the policy period, it is not clear, from the record currently before the court, whether pro rata allocation applies here. It is equally unclear what impact pro rata application would have on Brooklyn Union's self-insured retention, if it does apply, since relevant details regarding contamination at the sites have not been presented to the court. Furthermore, although possible application of pro rata allocation would be likely to prevent Brooklyn Union from obtaining summary judgment on its claim, it certainly doesn't provide a basis for summary judgment for Century - it merely indicates that there are questions of fact to be resolved by the trier of fact.

Brooklyn Union also argues that Century's many letters responding to Brooklyn Union's requests for coverage do not reflect any substantive investigation by Century, but rather, are merely boiler plate responses, made to any environmental claim, and do not satisfy Century's duty to conduct a "prompt investigation," as required by Insurance Law § 2601 (a) (3). Brooklyn Union contends that the motion for partial summary judgment must be denied, because whether Century's response to Brooklyn Union's claims for coverage was reasonable, is a matter of fact which must be determined by the jury, and may not be determined by the court on a motion for summary judgment.

As Brooklyn Union notes, the very language contained in

Century's various letters raise a question as to whether their responses are substantive responses to Brooklyn Union's requests for coverage, or boilerplate responses as Brooklyn Union contends. One such letter states:

> The CIGNA companies in question have identified a number of significant coverage issues which often exist in General Liability policies and which bear on the question of whether insurance coverage exists for environmental claims, such as the ones involved here.

Letter of A. Alan Benjamini, dated July 6, 1994, at 6 (emphasis supplied). Whether such responses fulfil Century's obligation to timely respond to its claim are matters of fact to be determined by the jury. See BNP *Paribas (Suisse)* S.A. v Chase Manhattan Bank, 298 AD2d 167 (1st Dept 2002); Columbus Trust *Co. v* Hanover *Ins. Co.,* 50 AD2d 798 (2d Dept 1975). Similarly, the trier of fact must determine whether the "investigation" purportedly conducted by Suzanne Gray was a substantive investigation, or whether she merely gathered the materials concerning the various sites which were provided to her by Brooklyn Union.

Finally, on the basis of language in Brooklyn Union's answer to interrogatories, Century contends that, with respect to the period after June 30, 1998, "the gist" of Brooklyn Union's claim is that Century did not respond to a settlement demand made to Century.[1] Century argues that, to the extent that Brooklyn Union

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[1] Specifically, on October 11, 2000, representatives from Brooklyn Union ... met with Century's representatives and made a settlement demand with respect to ... Brooklyn's MGP claims... . By letters dated

is asserting a claim for breach of contract for the period after June 30, 1998, its sole remedy is termination of the Standstill Agreement, which provides:

> The sole and exclusive remedy of any Party hereto for any alleged failure to negotiate in good faith or use its best efforts to resolve issues that arise during the negotiations period shall be cancellation of this Agreement.

Standstill Agreement, ¶ 13.

Brooklyn Union contends that it is not suing Century for breach of the Standstill Agreement, but for breach of the underlying policies, and that its right to do so is protected by the following language in the Standstill Agreement:

> Except as specifically provided herein, this Agreement shall not be deemed to constitute a waiver of any claim, right or defense of either Party as against the other.

> October 31, 2000 and November 3, 2000, Brooklyn Union sent Century's counsel several boxes of site reports and past cost information concerning the Brooklyn Union claims that he requested after the October 11 meeting.
>
> On several subsequent occasions, Brooklyn Union's counsel contacted counsel for Century to determine the status of Century's response to Brooklyn Union[`s] ... demand for coverage. After several vague promises that Century's response would soon be forthcoming, by May 24, 2001 it had become apparent that Century had no intention of responding to Brooklyn Union[`s] ... demand for coverage; therefore, pursuant to the terms of the Standstill Agreement, Brooklyn Union terminated the Agreement.

Brief in Support of Century Indemnity Company's Motion for Partial Summary Judgment, at 7, quoting Brooklyn Union's Response to Interrogatory No. 1.

Standstill Agreement, ¶14. According to Brooklyn Union, the claims, rights or defenses referred to in paragraph 14 related to the tolling of "[a]ll statutes of limitation, laches, waiver, estoppel, or other defenses or causes of action pertaining to the Claims and policies at issue... ." Standstill Agreement, ¶ 4.

It is clear that plaintiff cannot claim that a failure to settle with them during negotiations constitutes a breach of the Standstill Agreement. Reading the Standstill Agreement in its entirety, however, it is, at best, unclear whether the parties intended to bar plaintiff from alleging a continuing breach of their obligations pursuant to the underlying insurance contracts during that period. Defendant's motion for summary judgment as to the period after June 1998, must be denied as well.

Accordingly, for the foregoing reasons it is hereby

ORDERED that defendant's motion for partial summary judgment is denied.

Dated: 6/24/03

ENTER:

J.S.C.

HON. LOUISE GRUNER GANS