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

PRESENT: HAROLD BEELER Justice PART 9

NATIONAL UNION FIRE

- v -

STATE INSURANCE FUND

INDEX NO. 602951/98

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

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 granted;

See annexed Order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 6/23/03

HAROLD B BEELER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

At IAS Part 9 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 71 Thomas Street, New York, New York on the 23rd of June, 2003.

PRESENT: **HON. HAROLD B. BEELER,**
Justice

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH PENNSYLVANIA,
Plaintiff,

-against-

THE STATE INSURANCE FUND,
Defendant.

INDEX NUMBER 602951/98
Motion Sequences 002 & 003
DECISION & ORDER

This is a declaratory judgment action in which plaintiff seeks a declaration that defendant is obligated to contribute one-half of the costs of a settlement of a personal injury suit brought by a worker injured in a construction accident in 1992. Plaintiff, National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union") and defendant, the State Insurance Fund ("SIF") separately move for summary judgment in their favor (MS002 and MS003 respectively).

The Underlying Case

On or about July 8, 1991, the New York City School Construction Authority ("SCA") contracted with general contractor R.D. Mortman and Co. ("Mortman") for renovations at a public school, I.S. 201, located at East 127th Street and Madison Avenue in New York County. Mortman subcontracted work to Septic Systems, Inc. ("Septic Systems") by a Purchase Order, dated October 23, 1991. James Vivelo, an employee of Septic Systems, was injured on January 28, 1992 after

falling from a ladder at the I.S. 201 construction site. Vivelo filed a personal injury action on March 24, 1994 against SCA, the City of New York, the Board of Education of the City of New York, Lehrer McGovern Bovis Inc. (project manager) and Mortman.

At the time of the accident, National Union, under an Owner's Controlled Insurance Program, provided general liability coverage to its named insured SCA and to all contractors working on the school renovation project, as additional insureds, including Septic Systems as a subcontractor. The National Union policy provided for an exclusion of coverage for injured employees of the insured. However, there was an exception to this exclusion in the event of "liability assumed by the insured under an insured contract."

National Union also insured Septic Systems under a separate employers liability and workers compensation policy. SIF separately provided Septic Systems employers liability and workers compensation coverage. In the Vivelo lawsuit, all defendants, except the City of New York, were represented by the same law firm selected by National Union.

On February 25, 1997, National Union notified SIF in writing of Vivelo's accident and of the coinsurance coverage of Septic Systems. National Union tendered a request for contribution and indemnity under SIF's employers liability policy with Septic Systems.

By letter, dated March 12, 1997, SIF acknowledged receipt of National Union's February 25, 1997 letter, requested the pleadings in the matter and advised plaintiff that once SIF reviewed the pleadings, it would respond as to its coverage position. SIF further advised National Union that it had no record of any claim filed by Vivelo concerning the January 28, 1992 accident.

In the interim, on April 15, 1997, the Honorable Jane S. Solomon granted summary judgment in favor of Vivelo on the issue of liability on his Labor Law § 240(1) claim against all

the defendants. The Court also granted summary judgment to the City of New York on its cross-motion for indemnification against its co-defendants.

The next communication between the parties was a letter from plaintiff to defendant on September 18, 1997 in which National Union enclosed a copy of the pleadings in the Vivelo lawsuit, as previously requested by SIF. In the letter, plaintiff requested defendant's position in writing concerning coverage and coinsurance as soon as possible.

After this letter, there were conversations between plaintiff and defendant in which National Union advised SIF of its belief that both insurers had significant liability exposure in the Vivelo case and of plaintiffs desire to settle the matter. Defendant responded that it believed it had no coinsurance responsibility since Septic Systems had never been impleaded as a party to the Vivelo action. Plaintiff also advised defendant of a scheduled mediation in the case for October 6, 1997 and of an upcoming trial date and that, in the event defendant declined to participate in any settlement, plaintiff would institute a declaratory judgment action to enforce its claim for coinsurance.

On October 6, 1997, plaintiff settled Vivelo's action for $750,000 and waived its right to a workers compensation lien of $86,600. Although not a party to the lawsuit, Septic Systems paid for the entire settlement under the latter's employer liability policy with National Union. None of the other defendants contributed toward the settlement, it being plaintiffs stated belief that ultimate liability in the case would pass through to Septic Systems inasmuch as the accident occurred prior to the "grave injury" amendment to the Workers Compensation law and Vivelo had fallen from a Septic Systems' ladder while working in Septic Systems' employ under the direction and supervision of its personnel.

On October 29, 1997, SIF formally disclaimed in writing to National Union any obligation to contribute to the settlement on the grounds Septic Systems was not party to the Vivelo action, Septic Systems failed to notify defendant of the accident, and plaintiff voluntarily settled without adequate consultation with defendant.

On June 16, 1998, plaintiff filed the instant declaratory judgment action seeking defendant's contribution for one-half of the costs of the settlement of the Vivelo action.

Plaintiff's and Defendant's Motions for Summary Judgment

Each party raises numerous grounds in support of its motion for summary judgment and in opposition to the motion of its adversary. SIF contends that it has no obligation under its employers liability policy to contribute any share of the costs of the Vivelo settlement because Septic Systems was never actually impleaded as a party in the Vivelo action.

Defendant's employers liability policy provides in pertinent part: "We [The State Insurance Fund] will pay all sums you legally must pay as damages because of bodily injury to your employees . . . where recovery is permitted by law . . . (1) for which you are liable to a third-party by reason of a claim or suit against you by that third-party to recover damages claimed against such third-party as a result of bodily injury to your employee."

SIF's reading of this section of the policy as excluding coverage for an insured unless the insured was sued in a lawsuit is, in this Court's view, far too narrow. While it is true, as National Union concedes, that defendant had no obligation to defend Septic Systems as a non-party to the action, SIF's duty to indemnify is broader requiring it to determine if there was any factual or legal basis for Septic System's liability. *Servidone Construction Corp. v. Security Insurance Co. of Hartford*, 64 NY2d 419 (1985). Under the terms of SIF's policy it is required to pay for damages

which its insured is legally obligated to pay as a result of a *claim* or a lawsuit against it. No formal action need be pending before defendant's obligation to indemnify arises as long as the potential for legal liability on the part of its insured exists.

SIF further contends, however, that not only was Septic Systems not a party in the Vivelo action but that it could ***never*** have been impleaded in the case. If this were true, defendant would, of course, be under no duty to indemnity because its own insured could never be legally obligated to pay for any damages caused. In this regard, defendant refers to the contract between Mortman and Septic Systems, a three-page purchase order, which SIF claims contained an indemnification provision.

The front side of each page of the purchase order states that it incorporates the Standard Provisions contained on the reverse side. During the three-year period that the Vivelo litigation was pending, only the front side of the purchase order was produced. Defendant has now, in support of its motion, appended the reverse side of a current Mortman purchase order which SIF contends contains the same Standard Provisions in effect at the time of the Vivelo accident.

One of the Standard Provisions requires the Mortman subcontractor to indemnify and hold harmless Mortman, as well as any project owner and its agents. Had such a standard provision been incorporated in the Mortman purchase order with Septic Systems, then Septic Systems would have had to indemnify Mortman, **SCA,** the project owner, and its agent Lehrer McGovern Bovis, Inc. Such an indemnification provision would be a liability assumed by Septic Systems under an insured contract, requiring National Union to provide insurance coverage to Septic Systems under plaintiffs General Liability policy.

Defendant contends that plaintiff deliberately failed to diligently search for and produce the reverse side of the purchase order during the Vivelo litigation because National Union knew that the reverse side would reveal the existence of the aforementioned indemnification provision and trigger National Union's obligation to insure Septic Systems under the general liability policy. Any claim by any of the other defendants insured under the same general liability policy against Septic Systems would then have been absolutely barred by the anti-subrogation rule of *North Star Reinsurance Corp. v. Continental Insurance Co.*, *82* NY2d *28* 1 (1993).

Defendant claims, therefore, that it has no responsibility to share in the Vivelo settlement because Septic Systems could never have been impleaded as a party and that plaintiff acted in bad faith in attributing the entire settlement to Septic Systems under National Union's employer liability policy solely to seek co-insurance contribution from defendant under its own employer liability policy.

The Court agrees with defendant that were there an indemnification and hold-harmless provision in the 1991 Mortman subcontract with Septic Systems, the anti-subrogation rule would have prohibited impleader of Septic Systems and any settlement attributing full liability to Septic Systems would have been improper. However, as plaintiff persuasively argues, SIF has provided absolutely no evidentiary proof in admissible form to support its claim that the Mortman subcontract with Septic Systems contained such a provision.

The parties agree that only the front sides of the purchase order subcontract were produced during the three years the Vivelo lawsuit was pending. Even were there some merit to defendant's assertion that plaintiffs potential "conflicted" position in the Vivelo lawsuit led it to be less than diligent in determining whether the Standard Provisions were in fact an incorporated

into the 1991 Mortman subcontract, it is no less true that at no time during the more than four years that discovery was ongoing in the instant declaratory judgment litigation did SIF establish that the Mortman subcontract contained any indemnification clause. Neither by way of deposition of any representative of Mortman, or through any document production, or even by affidavit of a witness was it shown by defendant that there was a reverse side to the Mortman/Septic Systems subcontract or that such reverse side contained the exact same Standard Provisions said to be currently in effect. Accordingly, the anti-subrogation rule would not have prevented impleader of Septic Systems since it was covered only under National Union's employer liability policy which did not cover the same risk as National Union's general liability policy. *Hartford Accident and Indemnity Co. v. Michigan Mutual Insurance Co.*, 61 NY2d 569 (1984).

SIF also contends that it did not receive timely notice of any claim arising out of the Vivelo accident and, therefore, is relieved of its obligation to insure. Timely notice of a claim by an insured to its liability carrier is a condition precedent to coverage. *American Home Assurance Co. v. International Insurance Co.*, 90 NY2d 433 (1997). An insured is under an obligation to provide such notice as soon as it is practicable. *White v. City of New York*, 81 NY2d 955 (1993).

At no time did Septic Systems or Vivelo himself ever notify defendant of the accident. Not until National Union's February 25, 1997 letter to SIF, tendering a request for contribution for defense and indemnity, did defendant receive notice of the accident. Such unexcused delay in notification, coming three years after the action was commenced, two years after depositions were taken and almost one year after the Note of Issue was filed, is unreasonable as a matter of law. *Security Mutual Insurance Co. v Acker-Fitzsimons Corp.*, 31 NY2d 436 (1972). Plaintiff contends that, notwithstanding any determination of late notice to SIF, defendant is estopped from asserting

such an exclusion or any defense under its employers liability policy because of its failure to timely disclaim liability. Under Insurance Law 3420(d), an insurer is obligated to provide written notice disclaiming liability or denying coverage for death or bodily injury as soon as is reasonably possible. The reasonableness of any delay by an insurer in providing such notice is measured from the time it is made aware of sufficient facts to disclaim coverage. *Ward v. Corbally, Gartland & Rappleyea*, 207 AD2d 342 (2nd Dep't 1994).

As of national Union's February 25, 1997 letter, defendant was on notice of the Vivelo accident and of plaintiffs request for coinsurance for defense and indemnity under SIF's Employer Liability policy with Septic Systems and was, therefore, under an obligation to determine as soon as possible whether any grounds for disclaimer of liability or coverage existed.

In this regard, defendant cannot rely on any claimed dereliction of duty on plaintiffs part in failing to supply it with the pleadings in the Vivelo case to excuse the lengthy delay in disclaiming liability. An insurer will be found to have unreasonably delayed in making a disclaimer if such delay results from its failure to diligently conduct its own independent investigation into the circumstances surrounding a claim. *Cohen v. Atlantic National Insurance Co.*, 24 AD2d 896 (2nd Dep't 1965). Having utterly failed to undertake any investigation of its own, defendant's October 29, 1997 disclaimer, coming 8 months after first being apprised of the Vivelo accident, is untimely as a matter of law. *Reliance Insurance Co. v Kenosian*, 46 AD2d 38 (3rd Dep't 1974).

Defendant's further assertion, relying on the authority of *Zappone v. Home Insurance Co.* 55 NY2d 131 (1982), that it was under no obligation to timely disclaim coverage because there was no coverage unless Septic Systems was sued as a party is without merit in view of the existence of the employers liability policy in effect at the time of the Vivelo accident as well as

defendant's unduly narrow construction of that policy, as hereinbefore discussed, as to when its duty to indemnify arises.

Lastly, the Court agrees with National Union that it did not act as a volunteer in settling the Vivelo claim on behalf of Septic Systems inasmuch as defendant was aware of the pending lawsuit and scheduled settlement conference and chose not to participate therein. *Hertz Corp. v. Geico*, 250 AD2d 181 (1st Dept 1998); *Investors Insurance Co. of America v. Hartford Fire Ins. Co.*, 233 AD2d 197 (1st Dept 1996).

For all the aforesaid reasons, defendant's motion for summary judgment is denied and plaintiffs motion for summary judgment is granted.

It is hereby declared that:

(1) SIF was obligated to provide employers liability insurance to Septic Systems for the claim of James Vivelo.

(2) The insurance provided by SIF for the claim of James Vivelo was concurrent primary insurance, along with that provided by National Union.

(3) SIF was obligated to insure and indemnify Septic Systems for the Vivelo claim on a primary and coinsurance basis with the coverage afforded under National Union's policy issued to Septic Systems.

(4) SIF is obligated to reimburse National Union for one-half of the cost and disbursements incurred in the settlement of the Vivelo action; and that there be a judgment in favor of National Union in the amount of $375,000.00, representing one-half of the cost of settlement paid by National Union in the Vivelo action, plus one-half the cost of defending the Vivlelo action with interest on the entire judgment.

(5) There be a judgment in the amount of $43,300.00 representing one-half the cost to National Union of the waiver of the Workers' Compensation lien in the Vivelo action.

WHEREFORE, it is hereby

ORDERED, that plaintiffs motion for summary judgment (MS002) in its favor is granted; and it is further

ORDERED, that defendant's motion for summary judgment (MS003) in its favor and dismissal of plaintiffs Complaint against it is denied.

This is the decision and order of the Court.

DATED: June 23,2003

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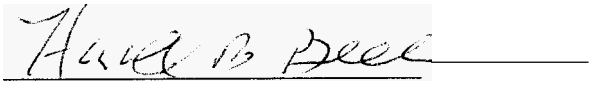

HAROLD B. BEELER, J.S.C.