MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 13

NEW YORK CITY TRANSIT AUTHORITY — INDEX NO. 13572/03

- against - — BY: DOLLARD, J.

NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH — DATED: OCTOBER 3, 2005

In this action for declaratory judgment, plaintiff New York City Transit Authority (TA) seeks an order granting summary judgment and declaring that defendant National Union Fire Insurance Co. of Pittsburgh (National Union) has a duty to defend and indemnify it in the underlying action commenced in Supreme Court, Kings County and entitled Alejandro Gonzalez v City of New York, and declaring that National Union is required to reimburse the TA for legal fees and costs incurred in defending Gonzalez. National Union, separately moves for an order granting summary judgment and declaring that it has no duty to defend and indemnify the Transit Authority in the underlying action.

These motions are consolidated for the purpose of a single decision.

In the underlying action, Alejandro Gonzales alleges that he sustained personal injuries on February 25, 1996 during the course of his employment with Fischbach Corporation (formerly Fischbach & Moore), when he slipped and fell on the train tracks

at the “D” line subway station, near the Brighton Beach Station in Brooklyn, New York. The TA is a named insured under a Railroad Protective Liability Policy issued by National Union (policy number RRP RMGL 1759535) which was in effect from April 1, 1993 to April 1, 1994, and extended to April 1, 1995. The TA, pursuant to the terms of contract number S-32305, is also an additional insured under a General Liability Policy issued by National Union to Fischbach Corporation, which was in effect from April 1, 1994 to April 1, 1995 (policy number 03197055). This policy shall be referred to as the Fischbach policy.

Alejandro Gonzalez commenced the underlying action on March 4, 1996, and stated in his complaint that a notice of claim was served upon the City of New York and the Transit Authority, within 90 days of the February 25, 1995 accident. The TA was served with the summons and complaint on April 10, 1996. The TA sent the pleadings to AIG Claim Service Inc. (AIG), National Union’s claim service representative, by certified mail and fax on April 10, 1996. The TA informed AIG that Gonzalez’s employer, Fischbach & Moore, agreed to provide indemnity and hold it harmless under contract number S-32305, and further, that as a result of the contract’s insurance requirements, was a named insured under policy RRP RMGL 1759535. The TA included a copy of a certificate of insurance evidencing coverage, the relevant portions of contract S-32305 and the TA accident report. The TA stated that it had no record of a notice of claim having been

filed.

AIG, in a letter dated April 16, 1996, acknowledged receipt of the TA's letter and stated that it was presently investigating the facts of the loss and was unable to consider its request at this time.

AIG, in a letter dated May 6, 1996, disclaimed coverage solely as to the Railroad Protective policy. AIG stated that it was in receipt of the Gonzalez summons and complaint, as well as an affidavit of service indicating that the notice of claim was served on the TA on May 5, 1995 and filed on May 9, 1995. AIG further stated that "[t]his policy will neither indemnify nor defend the New York City Transit Authority against the allegations of the above-mentioned lawsuit. We refer you to the Railroad Liability Coverage Form, CG003509690, part and parcel of this endorsement is Section IV Conditions." AIG set forth the policy's "Subsection B2 Duties In The Event of Occurrence, Claim or Suit," which requires the insured to notify the insurer "as soon as practicable of an occurrence which may result in a claim." AIG stated that the TA did not immediately send the insurer copies of the notice of claim and legal papers associated with the notice of claim, and that this was a violation of a condition precedent to coverage. AIG, therefore, stated, on behalf of National Union, that it would not defend or indemnify the TA in the underlying action. It also stated that if the TA could prove that it did not violate this term and condition of the policy, it

would re-evaluate its coverage position, and reserved its rights under the policy in the event that it re-evaluated its position.

In a letter dated June 21, 1995 (sic) AIG notified the TA that it would not indemnify or defend the TA in the Gonzalez action, under the policy issued to its insured, Fischbach & Moore. It stated that the summons and complaint had been served upon the TA, a named defendant on or about March 1996, and that a copy of the pleadings was not timely forwarded to National Union, or its agents, as tender was not made until April 10, 1996. It was also stated that no notice of the claim was timely given to the insurer or its agents. AIG made specific reference to the policy's notification conditions, and stated that since the TA had "failed to report either the occurrence, claim or suit until your tender of April 10, 1996 (when we received the Notice of Motion for a default together with exhibits), we regret to inform you that there is **no coverage** afforded to your company for this loss under the subject policy of insurance. We are disclaiming coverage at this time based upon late notice of this occurrence and the failure to immediately forward the Notice of Claim and Summons and Verified Complaint received by your company in the action commenced against your by the above-referenced plaintiff."

The TA thereafter commenced the within action for declaratory judgment on June 3, 2003. TA's counsel, in a letter dated June 27, 1996, tendered a claim to AIG as an additional insured under the Fischbach policy. AIG, in a letter dated July

3, 1996 stated that a disclaimer had already been issued to the insured in this matter.

In support of its motion for summary judgment, the TA asserts that its letter of April 10, 1996 provided the insurer with sufficient notice that it was tendering a claim under the Railroad Protective Liability policy, and the Fischbach policy, which named it as an additional insured pursuant to the terms of its contract with Fischbach. The TA asserts that the documents forwarded to AIG at the time of the April 10, 1996 tender included the certificate of insurance which named the TA as an additional insured under the Fischbach policy and contained the Fischbach policy number and a copy of the relevant pages of the TA-Fischbach contract. It is, therefore, asserted that the insurer was aware of the fact that the TA tender of April 10, 1996 was under both policies, and that the failure to disclaim under the Fischbach policy until 72 days after the claim was made, was unreasonable as a matter of law, rendering disclaimer invalid. The TA, therefore, seeks a declaration to the effect that National Union has a duty to defend and indemnify the TA in the underlying action and to reimburse the TA for all defense costs incurred in that action, to date.

National Union, in opposition, asserts that the TA's letter of April 10, 1996 only tendered a claim as to the Railroad Protective policy and that this letter was insufficient to tender a claim as to the Fischbach policy. It is asserted that the

document forwarded to it included the certificate of insurance for the Railroad Protective policy and the declaration sheet for that policy and not the certificate of insurance or declaration sheet for the Fischbach policy. In the alternative, the insurer asserts that if the court finds that the April 10, 1996 letter was sufficient to tender a claim as to both policies, then its disclaimer letter of May 6, 1996, as a matter of equity, should be considered a sufficient disclaimer as to both policies.

The TA, in its reply, asserts that National Union's acceptance of the April 10, 1996 tender by the TA of a claim under both policies is evidenced by the insurer's reservation of rights letter of April 16, 1996 in which it clearly referred to the insured as "Fischbach Corp." and utilized the Fischbach claim number that had been assigned by AIG. This letter did not refer to the Railroad Protective policy claim number and specifically acknowledged receipt of the April 10, 1996 tender letter. Furthermore, the disclaimer on June 21, 1996 under the Fischbach policy, specifically stated that the TA had tendered a claim on this policy on April 10, 1996.

National Union, in its motion for summary judgment, asserts that Mr. Gonzalez was injured on February 25, 1995 and that although the TA was aware of the accident on February 28, 1995, it failed to timely notify the insurer of the incident. It is further asserted that the TA's letter of April 10, 1996 only provided notice of a claim under the Railroad Protective policy,

and that the May 6, 1996 disclaimer was timely as to that claim. As to the Fischbach policy, the insurer asserts that the TA only provided it with notice of the claim under that policy on June 27, 1996, after it had disclaimed coverage under this policy. It is, therefore, asserted that the TA did not provide timely notice of the Gonzalez occurrence, claim and suit under the clear notice provision of both policies, thus vitiating coverage to the TA. National Union, therefore, seeks a declaration to the effect that it does not have a duty to defend and indemnify the TA in the underlying action. The TA, in opposition to National Union's motion, reiterates the arguments it presented in its own motion for summary judgment.

The May 6, 1996 disclaimer as to the Railroad Protective policy is not at issue here. As an additional insured under the Fischbach policy, the TA had an independent duty to provide the insurer with timely notice of the claim against it and its demand for coverage (see generally American Home Assurance Co. v International Insurance Co., 90 NY2d 433 [1997]; City of New York v St. Paul Fire and Marine Insurance Company, ___ AD3d ___, 2005 NY Slip Op 6765, 2005 NY App Div LEXIS 9191 [2005]; Travelers Insurance Co. v Volmar Construction Co., Inc., 300 AD2d 40 [2002]; Nationwide Insurance Co. v Empire Insurance Group, 294 AD2d 546 [2002]; Roofing Consultants v Scottsdale Insurance Co., 273 AD2d 933 [2000]; American Manufacturers Mutual Ins. Co. v CMA Enterprises, 246 AD2d 373 [1998]).

The court finds that the TA's letter of April 10, 1996, and the accompanying documents sent to the insurer's representative sufficiently provided the insurer with notice of the TA's claim under the Railroad Protective policy and the Fischbach policy. This letter identified Fischbach & Moore as the contractor, set forth the contract number, and stated that Fischbach had a contractual duty to provide indemnity and hold the TA harmless from any loss, liability, claims and expenses, for injuries or damages arising out of the work. The letter referred to enclosed documents which included the relevant pages of the contract requiring Fischbach to procure commercial general liability insurance naming the TA as the insured. In addition, the TA provided AIG with the declarations page issued to Fischbach which set forth the Fischbach policy number. These documents were also faxed to AIG.

National Union's records establish that the Fischbach claim file (claim number 247-032454) was created in response to the April 10, 1996 tender. There is no evidence that National Union learned of the TA's claim under the Fischbach policy from any source other than that of the tender letter of April 10, 1996 and the accompanying documents. The evidence presented establishes that the insurer was aware that the TA was an insured under both policies. The insurer's internal memoranda establishes that throughout May 1996, it was aware of the need to disclaim in a timely fashion as regards the Fischbach policy, if

in fact it was going to disclaim coverage. There is no evidence, however, that the insurer continued to investigate any grounds for disclaiming other than late notice, after it issued the May 6, 1996 disclaimer. The June 21, 1996 disclaimer under the Fischbach policy was based upon the same lack of notice that formed the basis for the May 6, 1996 disclaimer. The insurer's assertion that the TA did not tender a claim under the Fischbach policy until after the June 21, 1996 disclaimer is belied by the disclaimer itself. The June 21 disclaimer letter stated that "[d]espite service of a Notice of Claim in May 1995 and subsequent service of the above-referenced Summons and Verified Complaint, no tender of your company's defense was made until your letter of April 10, 1996" (emphasis added).

The court finds that the TA properly tendered a claim under the Fischbach policy on April 10, 1996. The court further finds that to the extent that the TA submitted a second notice of claim under the Fischbach policy on June 27, 1996, this notice was unnecessary. The insurer clearly recognized this, as it stated in its letter of July 3, 1996 that a disclaimer had already been issued.

It is well settled that "[p]ursuant to Insurance Law § 3420(d), an insurance carrier is required to provide the insured with timely notice of its disclaimer or denial of coverage on the basis of a policy exclusion and will be estopped from disclaiming liability or denying coverage if it fails to do so" (Moore v

Ewing, 9 AD3d 484, at 487, [citation omitted] [2004]; see First Financial Insurance Co. v Jetco Contracting Corp., 1 NY3d 64 [2003]; Markevics v Liberty Mut. Ins. Co., 97 NY2d 646, 648-649 [2001]; Matter of Worcester Ins. Co. v Bettenhauser, 95 NY2d 185, 188-189 [2000]; Hartford Ins. Co. v County of Nassau, 46 NY2d 1028 [1979]; Brighton Cent. Sch. Dist. v Am. Cas. Co., 19 AD3d 528, 529 [2005]; Campos v Sarro, 309 AD2d 888 [2003]; Mount Vernon Fire Ins. Co. v Gatesington Equities, 204 AD2d 419 [1994]). The court finds that National Union failed to sustain its burden of justifying the delay of more than two months in disclaiming coverage on the Fischbach policy (see First Financial Insurance Co. v Jetco Contracting Corp., supra). "An insurer's explanation is insufficient as a matter of law where the basis for denying coverage was or should have been readily apparent before the onset of the delay" (First Financial Insurance Co. v Jetco Contracting Corp., supra). Since National Union's disclaimer was predicated upon the alleged late notice of claim, and as the TA had tendered its claim on April 10, 1996 and as Gonzalez alleged he had filed a timely notice of claim against the TA following the February 1995 accident, the insurer's basis for denying coverage was readily apparent and, thus, its 72-day delay in issuing the disclaimer was unreasonable as a matter of law (see First Financial Insurance Co. v Jetco Contracting Corp., supra; Uptown Whole Foods, Inc. v Liberty Mutual Fire Insurance Co., 302 AD2d 592 [2003]; City of New York v Northern Insurance

Co. of New York, 284 AD2d 291 [2001]; North Country Insurance Co. v Tucker, 273 AD2d 683 [2000]).

Finally, as AIG's letter of May 6, 1996 specifically disclaimed as to the Railroad Protective policy, and did not inform the insured that the insurer was also disclaiming under any other policy, this letter cannot serve as a disclaimer as to the Fischbach policy.

In view of the foregoing, the TA and National Union's motions for summary judgment are granted to the extent that it is the declaration of this court that National Union is required to defend and indemnify the TA in the underlying Gonzalez action, and that National Union is required to reimburse the TA for all costs and expenses, including legal fees incurred to date in the defense of the underlying action.

Settle order.

J.S.C.