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

PRESENT: HON. JOAN A. MADDEN J.S.C. PART 11

Justice

Index Number : 111069/2006

GA INSURANCE CO OF NEW YORK

vs

UTICA FIRST INSURANCE CO

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered ... is 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 in accordance with the annexed decision, order and judgment.

FILED
JUL 25 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: July 16, 2007

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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GA INSURANCE COMPANY OF NEW YORK and
ABR CONSTRUCTION, INC.,

Plaintiffs,

-against-

Index No.
111069/06

UTICA FIRST INSURANCE COMPANY,

Defendant.

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JOAN A. MADDEN, J.:

Plaintiffs GA Insurance Company of New York ("GA") and ABR Construction, Inc. ("ABR") commenced this action to enforce, against defendant Utica First Insurance Company ("Utica"), the amount of a judgment that they obtained against non-party Ridgewood Contracting ("Ridgewood"), Utica's insured, in a suit captioned GA Insurance Company of New York and ABR Construction Inc. v Ridgewood Contracting Corp. and Utica First Insurance Company, Index No. 110318/2003, Supreme Court, New York County (the "GA-ABR/Ridgewood-Utica Action").

Utica now moves, pursuant to CPLR 3211(a)(1) and (a)(7), for an order dismissing all causes of action asserted against it. Utica further requests, pursuant to CPLR 3211(c), that this court treat its pre-answer motion as one for summary judgment and, pursuant to CPLR 3001, that this court declare that Utica had no duty to defend or indemnify Ridgewood in the GA-ABR/Ridgewood-Utica Action, or to satisfy the judgment that plaintiffs obtained against Ridgewood therein.

BACKGROUND

The following facts are not in dispute.

On January 2, 2001, Jose Jiminez was injured in a fall while working on a construction/renovation project at 330 Wythe Avenue in Brooklyn, New York. In March 2001, Jiminez commenced a personal injury action against ABR, the general contractor on the project ("the Jiminez Action"), to recover for the injuries he allegedly sustained in that accident. In that action, ABR subsequently commenced a third-party action against Ridgewood, Jiminez's alleged employer and a subcontractor on the project("the Third-Party Action"), asserting a claim for contractual indemnification, among others.

On the date of the accident, Ridgewood was covered by a "Contractors Special Policy" issued by Utica. The policy provided commercial liability coverage for "all sums which an insured becomes legally obligated to pay as damages due to bodily injury or property damage ... caused by an occurrence" within the coverage territory. However, the policy specifically excluded coverage for "bodily injury, property damage, personal injury or advertising injury which is assumed under a contract or an agreement," and for "bodily injury to an employee of an insured if it occurs in the course of employment." Exclusion 8 further provided that,

> Exclusion 8. applies where the insured is liable either as an employer or in any other capacity; or there is an

> obligation to fully or partially reimburse a third person for damages arising out of paragraph 8.a. ... above

On July 18, 2002, after Ridgewood failed to appear in the Third-Party Action, ABR's counsel sent a letter to Utica requesting that it enter an appearance on Ridgewood's behalf. The letter included a copy of ABR's third-party complaint against Ridgewood, as well as a copy of the Jiminez complaint in the main action.

On July 23, 2002, within days of receiving the request from ABR's counsel, Utica retained Alternative Adjusters to contact its insured and investigate the occurrence. As part of this investigation, Utica asked Alternative Adjusters to confirm Jiminez's status as an employee of Ridgewood, as had been alleged in his complaint.

By letters dated July 24, 2002 and July 31, 2002, Alternative Adjusters requested a meeting with Ridgewood to obtain its statement about the occurrence. When Ridgewood failed to respond to these letters, Utica sent Ridgewood two letters, dated August 6, 2002 and August 12, 2002, warning its insured that the failure to cooperate and respond to Alternative Adjusters' request could result in a denial of coverage. Ridgewood failed to respond to Utica's letters. Alternative Adjusters then sent Ridgewood a third and final request for a meeting on September 9, 2002. All of these investigative efforts

proved unavailing. On September 19, 2002, Utica disclaimed coverage to Ridgewood, citing the employee exclusion in the policy. The disclaimer letter additionally stated that

> due to the existence of the contractual liability exclusion, coverage does also not exist for claims for indemnification by third parties in connection with the injuries sustained by Jose Jiminez

ABR subsequently elected not to pursue the Third-Party Action it had commenced against Ridgewood; instead, ABR and GA, its insurer, commenced the GA-ABR/Ridgewood-Utica Action on June 5, 2003. In that action, GA-ABR reasserted ABR's cause of action against Ridgewood for contractual indemnification and asserted two new causes of action against Utica, demanding additional insured coverage for ABR under Ridgewood's policy.

On July 2, 2003, two days after allegedly receiving the summons and complaint in the GA-ABR/Ridgewood-Utica Action, Utica sent Ridgewood a letter stating, in pertinent part:

> Enclosed you will find a copy of our September 19, 2002 letter, wherein coverage was denied to Ridgewood Contracting Corporation in connection with all claims and law suits that were, or would be, filed in connection with the Jose Jiminez accident. That denial remains in full force and effect.

On July 29, 2003, Utica moved to dismiss the two causes of action asserted against it by GA-ABR on the ground that they were precluded by the exclusions in the policy. By order dated March 26, 2004, Utica's motion was granted on the ground that coverage

for ABR was precluded by the employee exclusion in the policy.[1] Moreover, on March 23, 2006, the court awarded GA a total of $1,070,631.24, on the default judgment that GA-ABR had obtained against Ridgewood for contractual indemnification. That judgment has remained unsatisfied for more than 30 days following service of the notice of entry; accordingly, GA-ABR commenced the instant declaratory judgment action, in which they now seek to enforce the judgment against Utica, pursuant to Insurance Law §3420(b).

Insurance Law §3420 enables certain specified parties to maintain an action against an insurer "to recover the amount of a judgment against the insured or his personal representative" (Insurance Law §3420 [b]). Specifically, section 3420(a)(2) statute provides that such an action may be maintained by "any

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[1]In so holding, the court rejected plaintiffs' argument that Utica was estopped from disclaiming coverage to ABR, due to the untimeliness of the September 19, 2002 disclaimer that Utica had issued to its insured, Ridgewood. Specifically, the court found that ABR's third-party action had asserted claims solely against Ridgewood, and that no claim had been asserted by ABR against Utica,

> [h]ence, no duty arose on the part of Utica to give notice to ABR that it was disclaiming any coverage to Ridgewood. Consequently Utica's delay of 63 days in giving notice to Ridgewood does [not] aid plaintiffs as it does not, insofar as plaintiffs are concerned, bring into play the ... provisions of § 3420 (d) requiring notice of disclaimer "as soon as reasonably possible.

[as corrected by the Order dated July 26, 2004]. The court further found that the service of Utica's motion to dismiss was a timely response to the demand for additional insured coverage that GA-ABR had asserted in their complaint; therefore, the court held that the employee exclusion was enforceable, and Utica had no obligation to defend or indemnify ABR in that action.

person who, or the personal representative of any person who, has obtained a judgment against the insured or his personal representative to enforce a right of contribution or indemnity, or any person subrogated to the judgment creditor's rights under such judgment."[2]

Utica argues that this court should dismiss GA-ABR's causes of action, and award it summary judgment declaring that it has no obligation to defend or indemnify Ridgewood in the GA-ABR/Ridgewood-Utica Action, or to satisfy the default judgment entered therein, as all of the claims in that action arose out of Ridgewood's contractual obligations to ABR, and thus fall squarely within the contractual liability exclusion contained in Utica's policy. Utica additionally argues that, as Ridgewood's contractual indemnification obligation to ABR arose out of Jiminez's employment-related injuries, ABR's claims fall squarely within the employee exclusion to the policy, as well. Utica contends that its July 2, 2003 disclaimer, which denied coverage to Ridgewood based on these two exclusions to the policy in the GA-ABR/Ridgewood-Utica Action, is valid and enforceable, as the disclaimer was timely issued within two days after Utica received

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[2]Insurance Law § 3420(a)(2) requires that the judgment have remained unsatisfied for 30 days after notice of entry, and that the action be maintained against the insurer under the terms of the policy or contract for the amount of such judgment not exceeding the amount of the applicable limit of coverage under such policy or contract(id).

the summons and complaint.

GA and ABR argue that Utica's disclaimer of coverage to Ridgewood was not timely, as Utica's obligation to disclaim coverage was triggered upon its receipt of the notice of claim and the pleadings in the Jiminez and Third Party Actions, sent to it by ABR's counsel on July 18, 2002, and not upon its receipt of the summons and complaint in the subsequently filed GA-ABR/Ridgewood-Utica Action. GA and ABR contend that, as Utica did not disclaim coverage until September 19, 2002, which was 63 days after it received the July 18th letter and copies of the two complaints, the disclaimer was untimely as a matter of law and, pursuant to Insurance Law §3420(d), Utica is estopped from relying on any of the policy's exclusions to deny coverage to Ridgewood.

In reply, Utica argues that since ABR abandoned its Third Party Action in the Jiminez lawsuit, and since it is seeking to recover pursuant to the judgment in the GA-ABR/Ridgewood-Utica Action, the July 2, 2003 disclaimer in that action is the relevant disclaimer, and the timeliness of the September 19, 2002 disclaimer in the Jiminez/Third Party Action is of no import. Utica further argues, that the July 18, 2002 letter did not trigger a duty to disclaim, and even if the timeliness of the September 19th disclaimer is in issue, it was timely based on the need for an investigation of the claims. Since such investigation

was conducted in a prompt and diligent fashion, the September 19th disclaimer is timely.

In sur-reply, GA and ABR argue that the lawsuit in which the judgment was obtained is not relevant to the issue of when Utica's duty to disclaim was triggered. Rather Utica's duty to disclaim runs from the time its duty to defend was triggered, and as there was only one accident, its duty to defend arose when it received the pleadings in the Jiminez and Third Party Actions with the July 18, 2002 letter from ABR. Thus, Utica argues, the timeliness of the September 19, 2002 disclaimer controls.

Discussion

Before addressing the substantive issues, the procedural posture of the motions should be indicated. As GA and ABR have availed themselves of the opportunity to respond to Utica's evidentiary submissions accompanying its request for summary judgment, and have themselves requested that summary judgment be granted in their favor, this court will treat the instant motion as one for summary judgment, pursuant to CPLR 3211(c).

As stated above, GA and ABR sue Utica under Insurance Law §3420(b) based on a judgment obtained against Ridgewood, Utica's insured in the GA-ABR/Ridgewood-Utica Action. When a plaintiff is permitted to maintain a direct action against the insurer on a policy, the plaintiff "stands in the shoes of the insured and can have no greater rights than the insured"(citations omitted)

(D'Arata v New York Central Mutual Fire Insurance Co., 76 NY2d 659 [1990]) Thus, in this action, GA and ABR stand in the shoes of Ridgewood, and whatever rights GA and ABR have derive from Ridgewood. It follows that GA and ABR's grounds to challenge the timeliness of any disclaimer, are defined by Ridgewood's grounds for such challenge.

Regarding the timeliness of a disclaimer, Insurance Law §3420(d) provides that

> [i]f 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.

An insurer will be precluded from disclaiming coverage based on an exclusion in a policy where it has delayed unreasonably in issuing such disclaimer (see Matter of Worcester Ins. Co. v Bettenhauser, 95 NY2d 185, 188-189 [2000]).

As noted above, Utica argues that the September 19, 2002 disclaimer is not dispositive of the issues raised in the instant action, as the applicable disclaimer was in response to the claim for contractual indemnification that ABR asserted against Ridgewood in the Third Party Action, which ABR then abandoned. Utica contends that, as the judgment that GA and ABR now seek to enforce was entered in the subsequently filed GA-ABR/Ridgewood-

Utica Action, the timeliness of its disclaimer must be measured from the date that it received the summons and complaint in that action. In any event, Utica argues that, even if the September 19, 2002 disclaimer is applicable to the claims asserted in the GA-ABR/Ridgewood-Utica Action, Utica is not estopped from disclaiming coverage, regardless of the length of time it took to issue that disclaimer, because the July 18, 2002 notice from ABR's counsel did not trigger its duty to disclaim.

In order to determine whether Utica's disclaimer of coverage was timely made, it must first be determined when Utica's obligation to disclaim coverage to Ridgewood was triggered. The fact that the September 19, 2002 letter of disclaimer may have been issued in connection with Utica's receipt of the pleadings in ABR's Third-Party Action, does not limit the disclaimer to claims asserted in that action. Utica expressly acknowledged as much in its July 2, 2003 letter to Ridgewood, when it declared that the September 19, 2002 letter had denied coverage to Ridgewood "in connection with all claims and law suits that were, or could be, filed in connection with the Jose Jiminez accident." If Utica's obligation to disclaim coverage of the claim was triggered by its receipt of the July 18, 2002 notice and pleadings from ABR's counsel in the Jiminez/Third Party Action, then the timeliness of Utica's disclaimer must be measured from that date, regardless of the action in which GA and ABR actually

obtained the judgment they now seek to enforce.

Utica argues that the July 18, 2002 notice did not trigger its obligation to disclaim, because an insurer's duty to disclaim is triggered only when it receives notice from its insured and/or a claimant, and not where the notice of a claim is received from a third party (citing Hernandez v American Transit Ins. Co., 31 AD3d 343 [1st Dept 2006]). Here, Utica notes, it is undisputed that neither Ridgewood nor Jiminez ever notified Utica of either the underlying occurrence or the Jiminez lawsuit, and that Utica's only notice of the claim came from a third party, ABR's counsel.

In Hernandez, the First Department held that an insurer's obligation to disclaim liability was not triggered where

> neither plaintiff nor the insured ever notified the insurer of the accident, ... notwithstanding that it was made aware of the accident by counsel to one of the insured's co-defendants in the personal injury action.

(id. at 343, citing Travelers Ins. Co. v Volmar Constr. Co., Inc., 300 AD2d 40 [1st Dept 2002]). In so holding, the First Department distinguished First Fin. Ins. Co. v Jetco Contr. Corp. (1 NY3d 64 [2003]), in which the Court of Appeals held that an insurer is obligated to disclaim coverage promptly, even though the insurer had not been given notice of the occurrence by its insured, and had only learned about the occurrence from a co-defendant in the underlying action. As the First Department explained, First Financial was distinguishable because the

insurer had taken

> the unusual step of acknowledging in writing that it had received late notice of the claim from another source and that it was reserving the right to deny coverage on the basis of untimely notice. Given the insurer's express acknowledgment of the claim, the Court of Appeals concluded that the duty to disclaim had been triggered. The insurer's acknowledgment, moreover, effectively rendered notice of the claim pointless

(Hernandez, 31 AD3d at 344 [citations omitted]). In Hernandez, the First Department noted, the insurer never acknowledged an awareness of the claim before issuing its actual disclaimer of coverage.

Utica argues that the facts at bar are virtually indistinguishable from those in Hernandez; therefore, its holding should control this court's coverage determination. However, the record on this motion clearly shows that, unlike the insurer in Hernandez, Utica did expressly acknowledge an awareness of the claim in writing to its insured through the two letters sent to Ridgewood, at Utica's request, by Alternative Adjusters on July 24 and 31, 2002, as well as through the two letters that Utica sent to its insured on August 6 and 12, 2002. Given these circumstances, this court finds that Utica's express acknowledgment of the claim to its insured triggered the obligation to disclaim coverage (see First Fin. Ins. Co. v Jetco Contr. Corp., 1 NY3d 64 [2003]).

Nevertheless, Utica argues that, even if its obligation to

disclaim coverage was triggered by the July 18, 2002 notice from ABR's counsel, its September 19, 2002 disclaimer was not untimely, as the timeliness of a disclaimer must be measured from when an insurer first becomes aware of sufficient facts that form the basis of its disclaimer. Utica contends that, here, the unsworn allegation in Jiminez's complaint regarding his status as an employee of Ridgewood was not sufficient information on which to form the basis of a coverage determination; therefore, Utica was entitled to perform an investigation to confirm the allegation before issuing its disclaimer. Utica alleges that it promptly issued its disclaimer within one week after receiving a report from Alternative Adjusters indicating that the investigative efforts had been "unavailing"; therefore, this court should find that the disclaimer was timely.

The "'timeliness of an insurer's disclaimer is measured from the point in time when the insurer first learns of the grounds for disclaimer of liability or denial of coverage'" (First Fin. Ins. Co., 1 NY3d at 68-69, quoting Matter of Allcity Ins. Co. [Jiminez], 78 NY2d 1054, 1056 [1991]). The reasonableness of any delay is measured from the time when the insurer "has sufficient knowledge of facts entitling it to disclaim, or knows that it will disclaim coverage" (id at 66). "An insurer who delays in giving written notice of disclaimer bears the burden of justifying the delay" (id at 69).

Although the need to investigate issues affecting an insurer's decision whether to disclaim coverage may excuse a delay in disclaiming coverage (see 2540 Assoc. v Assicurazioni Generali, 271 AD2d 282 [1st Dept 2000]), where the basis for the denial of coverage was, or should have been, readily apparent before the onset of the delay, an insurer's explanation of the delay will be insufficient as a matter of law (First Fin. Ins. Co., 1 NY3d at 69; Boyis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co., 27 AD3d 84, 88 [1st Dept 2005]).

Here, the record shows that all of the information that Utica needed to determine whether a basis existed to deny coverage was contained in the underlying pleadings that ABR's counsel provided to Utica on July 18, 2002. Specifically, the third-party action against Ridgewood specifically sought contractual indemnification based on the alleged contractual indemnification obligation contained in Ridgewood's subcontract with ABR. Additionally, Jiminez's status as an employee of Ridgewood was specifically alleged in his personal injury complaint.

Although Utica argues that it was entitled to an opportunity to confirm Jiminez's employment status, Utica has alleged no basis for doubting the underlying allegation (see Squires v Robert Marini Bldrs. Inc., 293 AD2d 808, 809-10 [3rd Dept], lv denied 99 NY2d 502 [2002] [delay of 42 days from receipt of

complaint which alleged facts forming basis for disclaimer, per se unreasonable where insurer did not assert that it had any reason to doubt the allegations of the complaint]). Indeed, Utica acknowledges that its investigation proved unavailing, and that it ultimately based its September 19, 2002 disclaimer of coverage solely upon the very allegations and information contained in those underlying pleadings.

Under the circumstances herein, this court finds that Utica's explanation for its delay in disclaiming coverage is not sufficient, and thus, the 63-day delay between Utica's receipt of the notice and pleadings on July 18, 2002, and its issuance of the letter of disclaimer on September 19, 2002, was unreasonable as a matter of law. As the untimeliness of Utica's disclaimer precludes it from denying coverage to its insured based on the exclusions in the policy, (see Markevics v. Liberty Mutual Insurance Co., 97 NY2d 646, 649 [2001]; Worcester Insurance Co. v. Bettenhauser, 95 NY2d 185, 188-189 [2000]; Utica Mutual Insurance Co. v. Reid, 22 AD3d 127, 129 [2005]), Utica's motion to dismiss and for summary judgment declaring that it has no obligation to defend or indemnify Ridgewood in the GA-ABR/Ridgewood-Utica action, or to satisfy the default judgment entered therein, is denied.

Further, as it is not disputed that, but for the exclusions in the policy, Utica had an obligation to defend and indemnify

its insured in that action, and, as Insurance Law §3420(b) permits a judgment creditor, such as GA, to recover from an insurer the amount of a judgment obtained against its insured, plaintiffs are entitled, on summary judgment, to a declaration to that effect.

Accordingly, it is

ORDERED that defendant's motion to dismiss and for summary judgment is denied; and it is further

ORDERED that summary judgment is granted in favor of plaintiffs to the extent that it is ADJUDGED and DECLARED that defendant Utica First Insurance Company had a duty to defend and indemnify its insured, non-party Ridgewood Contracting, in the action captioned GA Insurance Company of New York and ABR Construction Inc. v Ridgewood Contracting Corp. and Utica First Insurance Company, Index No. 110318/2003, Supreme Court, New York County, and thus to satisfy the default judgment entered against its insured therein "for the amount of such judgment not exceeding the amount of the applicable limit of coverage under such policy" (see Insurance Law § 3420[a]).

Dated: July 16, 2007

ENTER:

J.S.C.