City of New York v Salvation Army
2009 NY Slip Op 30473(U)
February 27, 2009
Supreme Court, New York County
Docket Number: 401467/2008
Judge: Matthew F. Cooper
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SCANNED ON 3/4/2009

[* 1]

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

PRESENT: MATTHEW F. COOPER
Justice

PART 52

Index Number : 401467/2008

CITY OF NEW YORK

VS.

SALVATION ARMY

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

this motion to/for ______

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

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

MOTION AND CROSS MOTION(S) ARE DECIDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

FILED
MAR 0 2009
COUNTY CLERK'S OFFICE NEW YORK

Dated: Feb 27, 2009

MATTHEW F. COOPER
J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

---X

THE CITY OF NEW YORK,
Plaintiff,

against

THE SALVATION ARMY,
Defendant.

---X

Index Number 401467/2008
Mot. Seq. No. 001

DECISION AND ORDER

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Papers and exhibits considered in review of the motion for leave to amend the answer and cross-motion for summary judgment:

Notice of Motion, Annexed Affirmation and Exhibits	1
Memorandum of Law	2
Affirmation in Opposition	3
Notice of Cross Motion, Annexed Affirmation and Exhibits	4
Reply Affirmation and Exhibits	5
Reply Memorandum of Law	6

MATTHEW F. COOPER, J.:

This action was commenced by the City of New York ("City") for a declaration, pursuant to CPLR 3001, that defendant the Salvation Army ("Army") has a duty to defend the City in a negligence action currently pending in the Supreme Court of Kings County. That action is entitled *Joseph Stanley and Aphrodite Stanley as parents and natural guardians of Infant Plaintiff Joseph Stanley II, and Joseph Stanley and Aphrodite Stanley, Individually, v. City of New York, The Salvation Army of Greater New York and Anita Nurse*, ("the *Stanley* action"). The City now moves for summary judgment declaring that the Army is obligated to assume the City's defense in the *Stanley* action and requiring the Army to reimburse the City for attorneys' fees incurred in defending the *Stanley* action from June 21, 2007, to date. Alternatively, the City moves for summary judgment on its third cause of action for breach of contract alleging that if

the court "issues a determination that Salvation Army has no duty to defend the City, then Salvation Army will have breached its obligations to the City by failing to provide it with liability insurance coverage for Salvation Army's operations as required by the Agreement" that exists between the two. The Army opposes the City's motion on several grounds and cross-moves for summary judgment dismissing the complaint.

SUMMARY OF FACTS

On or about May 30, 2000, the City and Army entered into an agreement for the purchase of child welfare services (hereinafter, the Agreement). Pursuant to the Agreement, Army as contractor would provide child welfare services, including the placement of children in foster homes within their communities, to the City for the period March 1, 2000 to February 28, 2003. The contract was renewed twice, once in November 2002 and again in January 2006. The last renewal extended the agreement through February 28, 2009.

With respect to insurance, the Agreement provides, in relevant part:

> The Contractor shall carry paid up commercial general liability insurance covering both itself and the City with a limit no lower than $1,000,000 per occurrence and with a deductible no higher than $10,000. This policy shall provide coverage of at least as broad as that provided by ISO Form CG 00-01 (1/96 ed.) and shall contain no additional exclusions of any kind whatever except for those mandated by law and those expressly accepted by the Department in writing. The City's coverage thereunder shall be as additional insured, and such coverage shall be no narrower than that provided by ISO Form CG 20-26 (11/85 ed.). Such policy or policies of insurance shall be obtained from a company, or companies, duly licensed to do business in the State of New York ... .

See Agreement for Purchase of Child Welfare Services annexed as Exhibit 1 to Plaintiff's Motion, Part II, Article 2, Section 2.1. ISO Form CG 00-01 (1/96 ed.), which is entitled Commercial General Liability Coverage Form, requires the insurer to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property

damage' to which the insurance applies." *See* Exhibit 3 to Plaintiff's Motion, Section I (A)(1)(a). The form further provides that it is the insurer's right and duty to defend the insured in personal injury or property damage actions, but that the insurer has no duty to defend the insured in personal injury or property damage actions to which the insurance does not apply. *Id.* at Section I (A)(1)(a)(2). ISO Form CG 20-26 (11/85 ed.), an endorsement regarding the designation of a person or organization as an additional insured, qualifies the City as an additional insured for coverage "but only with respect to liability arising out of the operations or premises" of Army as the named insured. *See* Exhibit 4 to Plaintiff's Motion. Pursuant to the Agreement, the City had the obligation of notifying the insurer "as soon as practicable" of any occurrence, offense or lawsuit which may result in a claim. *See* Exhibit 3 at Section IV (2)(a) and (b).

In order to meet the insurance requirements of the Agreement, Army provided the city with a copy of its certificate of liability insurance and letters from its insurance carrier, Chesterfield Insurance Agency, Inc. *See generally* Exhibit 5 to Plaintiff's Motion. As indicated in the certificate of liability insurance, Army is self-insured for commercial general liability purposes with a limit of $500,000 per occurrence. *See* Certificate of Liability Insurance annexed as Exhibit 5. Army carries additional general liability coverage through an excess/umbrella liability policy from Chesterfield Insurance Agency, Inc., with a limit of $3,000,000 per occurrence. *Id.* There is no deductible for either the self-insured commercial general liability insurance or the excess/umbrella liability insurance. *See* 11/24/04 Letter of Susan Hamilton, Agent, Chesterfield Insurance Agency, Inc. annexed as Exhibit 5.

During the second renewal period of the Agreement, the infant Joseph Stanley II was placed into care with foster parent Anita Nurse. On June 6, 2006, while in the custody of Ms. Nurse, the infant was injured. On or about August 2006, a Notice of Claim, dated June 20, 2006,

was served on the City. On December 7, 2006, a 50(h) hearing was held of plaintiff Joseph Stanley, father and natural guardian of the infant plaintiff. In January 2007, the City and Army were served with a summons and complaint in the *Stanley* action.

On June 21, 2007, five months after it had been served with the summons and complaint, City forwarded, by fax, a copy to Chesterfield, Army's insurer, and requested that "defense counsel be assigned to defend [City]." *See* Exhibit 12 to Plaintiff's Motion. In a letter dated July 24, 2007, a Chesterfield claims representative denied the City's request citing a review of the contract between the parties as the basis for the denial. *See* Exhibit 13 to Plaintiff's Motion. The basis for the denial lacked any further specificity.

THE PARTIES' CONTENTIONS

City submits that pursuant to the Agreement, Army is obligated to defend it in the *Stanley* action. Specifically, the City contends that the *Stanley* complaint alleges bodily injury arising out of Army's work or operations and is thus within the scope of the insurance coverage that Army must provide to the City pursuant to the contract. Thus the City seeks a judgment declaring that Army is obligated to defend the City in the *Stanley* action and requiring Army to reimburse the City for fees incurred in defending the *Stanley* action from June 21, 2007, to date. Alternatively, City argues it should be granted summary judgment on its breach of contract claim in that Army failed to provide it with liability insurance coverage as required by the agreement between the parties.

The Army submits that the City's motion must be denied for several reasons. Initially, Army argues that the City's motion is premature as there has been no discovery in the underlying action and thus there remain questions of fact as to the City's role in the placement and supervision of the infant plaintiff and as to whether the claim against the City in the *Stanley* action arises out of Army's operations or out of the City's own omissions and

commissions. Specifically, Army contends that the claims against the City in the *Stanley* action are claims of independent acts of negligence by the City and are thus not within the ambit of the contract's insurance provisions as the contract limits the City's coverage as an additional insured under Army's policy to those accidents which arise out of Army's operations.

Additional arguments set forth by Army in opposition to the motion include: the City's claims for defense and breach of contact are identical to claims asserted in the underlying *Stanley* action; Army is not an insurer against whom declaratory relief is appropriate; City failed to comply with a condition precedent to coverage in that it failed to timely notify Army of the claim against it; that the City is not entitled to defense costs because the agreement between the parties does not provide for the defense of claims brought against the City; and that there was no breach of contract inasmuch as Army's status as a self-insurer was accepted by the City in full satisfaction of the insurance requirements of the contract. In its cross-motion for summary judgment to dismiss the complaint, Army puts forward the same arguments discussed above in its opposition to the City's motion.

DISCUSSION

The proponent of a motion for summary judgment has the burden in the first instance of submitting admissible evidence establishing its entitlement to judgment as a matter of law. CPLR 3212(b); *GTF Mtkg, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 (1985). Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form which raises an issue of fact requiring a trial. *Kosson v. Algaze*, 84 NY2d 1019 (1995).

Plaintiff City moves for summary judgment on this action for a declaration. Specifically, City seeks an order declaring and adjudging that defendant Army has a duty to defend City in the underlying *Stanley* action. Army argues in opposition that the subject of this dispute is not properly the subject of a declaratory judgment action because Army, as a self-insurer, is not an

insurer against whom declaratory relief is appropriate. Army further argues that this essentially a claim for indemnity with defense.

Pursuant to CPLR 3001, "The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." The statute further provides that should a court decline to render such a judgment, it must specify its reasons. CPLR 3001. Contrary to Army's position, the subject at issue here is precisely the type of "justiciable controversy" that a declaratory judgment resolves. *See People v. ELRAC, Inc.*, 192 Misc 2d 78, 81 (S Ct, NY County 2002) (The 'best recognized" course of action available in deciding and resolving the issue of termination or modification of a defense obligation by an insurer is a declaratory judgment action). Moreover, "there is no special and separate rule for self-insurers regarding the scope of [a] defense obligation." *Id.* at 81.

The court is also unpersuaded by Army's arguments that "this is essentially a claim for indemnity with defense" and that the defense and breach of contract claims herein are identical and duplicative of those asserted in the underlying *Stanley* action. In the underlying *Stanley* action, City asserted a cross-claim against Army for contribution and/or indemnity. Here, the City moves for a declaration that, pursuant to the insurance provision in the contract between the parties, Army has a duty to defend City in the underlying *Stanley* action or alternatively, that Army has breached the contract between the parties in that it failed to obtain the insurance required under the terms of the Agreement. An insurer's duty to defend an insured is separate and apart from an obligation to pay or indemnify an insured. *See, e.g., Fitzpatrick v. America Honda Motor Co.*, 78 NY2d 61, 65 (1991); *see also People v. ELRAC, Inc.*, 192 Misc 2d at 80. "The duty to defend arises as a matter of contractual obligation to the insured, whereas liability for indemnification rests on principles of basic negligence." *New Hampshire Ins. Co. v.*

[* 8]

Jefferson Ins. Co. of NY, 213 AD2d 325, 326 (1st Dept 1995). The duty to defend is broader than the duty to indemnify. *Fitzpatrick*, 78 NY2d at 65; *Technicon Electronics Corp. v. American Home Assurance Co.*, 74 NY2d 66, 73 (1989); *Int'l Paper Co. v. Continental Cas. Co.*, 35 NY2d 322, 326 (1974); *see also New Hampshire Ins. Co. v. Jefferson Ins. Co. of NY*, 213 AD2d 325, 326. Accordingly, an insurer may be contractually obligated to defend on a claim for which it is not required to pay or indemnify because it is later discovered that the claim falls within an exclusion. *See Int'l Paper Co.*, 35 NY2d at 327. (Insurer, who agreed to defend insured on any suit "alleging injury and seeking damages on account thereof, even if such suit is groundless, false or fraudulent," was required to defend insured on claims brought by employee later found to fall within exclusion clause). Thus, although the causes of action asserted by the City here and in the underlying *Stanley* action "arise out of the same subject matter or series of alleged wrongs, ... the nature of the relief sought is not the same or substantially the same" and therefore are not duplicative. *See Kent Development Co., Inc. v. Liccione*, 37 NY2d 899, 901 (1974).

The motion herein is for summary judgment declaring that Army is required to defend City in the underlying *Stanley* action. With respect to Army's duty to defend, the Agreement provides that Army has no duty to defend the City in personal injury or property damage actions to which the subject insurance does not apply. *See* Exhibit 3. The Agreement further provides that coverage for the City as an additional insured is only with respect to liability arising out of Army's operations. *See* Exhibit 4. In support of its motion, the City annexes a copy of the complaint in the underlying action. The *Stanley* complaint alleges, in relevant part,

> that Army entered into an agreement with City to provide foster care services; that Army had the same non-delegable duty of reasonable care owed to plaintiffs in the placement, care, custody and supervision of infant plaintiff while in foster care; that foster parent Anita Nurse served at the will and was an agent of City and Army; that Army recklessly, carelessly, negligently and with wanton disregard for the best interests of the infant plaintiff failed to

> adequately care for and/or supervise the custodial services provided to the infant by Anita Nurse, pursuant to its agreement with the City; that City and Army, knew or should have known that defendant Nurse failed to properly and/or adequately care for and/or battered and/or caused the infant plaintiff to be inadequately supervised ultimately resulting in injury; that while the infant plaintiff was in the care and custody and/or placement by City and Army, with Nurse, he was caused to be permanently injured; that the defendants City and Army acted in the placement and post-placement supervision of the infant plaintiff with Nurse; and that infant's plaintiff's incident occurred due to the negligence by City and Army of their non-delegable duty to properly care for and supervise those in foster care and that defendants negligently entrusted the care of the infant plaintiff to an unfit foster parent, conducted inappropriate investigations into the background and abilities of said foster parent, to wit: Anita Nurse.

See Stanley Complaint annexed as Exhibit 11 to Plaintiff's Motion.

An insurer's duty to defend is triggered whenever the facts or allegations of the complaint "potentially give rise to a covered claim" under the contract. *Worth Constr. Co. v. Admiral Ins. Co.*, 10 NY3d 411, 415 (2008); *see also Fitzpatrick*, 78 NY2d at 65 (Duty to defend triggered whenever facts or allegations of complaint bring the claim within a "reasonable possibility of recovery."); *Technicon Electronics Corp.*, 74 NY2d at 73 (If facts or allegations in bring claim "even potentially within the protection purchased," insurer obligated to defend.); *New Hampshire Ins. Co.*, 213 AD2d at 326-7 (Duty to defend triggered if facts alleged in complaint fall within scope of coverage intended by parties at making of contract.). Through its submissions, the City has established that the claims asserted against it in the *Stanley* action fall within the scope of the insurance coverage that Army agreed to provide under the Agreement. Thus, the City has met its *prima facie* burden in demonstrating its entitlement to a declaration that the Army is required to defend it in the *Stanley* action.

The burden now shifts to Army, as the opponent of the motion, to submit proof of a triable issue of fact. Army contends it has no duty to defend City because the claims asserted

against the City do not arise out of Army's operations and are thus an exception to coverage pursuant to ISO Form CG 20-26. Assuming *arguendo* that the language of ISO Form CG 20-26 qualifies as an exclusion [*Cf. Consolidated Edison v. Hartford Ins. Co.*, 203 AD2d 83, 84 (1st Dept 1994) ("Defendant's argument that the clause is an exclusion is without merit for as an endorsement, it is an addition, rather than a limitation of coverage and the 'but only' qualification does not change the meaning of the latter portion of the clause.")], an insurer who relies upon an exclusion in order to be relieved of its duty to defend and thus defeat an insured's motion for summary judgment must demonstrate "that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, *in toto*, are subject to no other interpretation." *Int'l Paper Co.*, 35 NY2d at 325.

Army does not deny that "the infant plaintiff [in the underlying action] was injured while in foster care with the Army's foster boarding program." *See* Army's Affirmation in Opposition, 10/16/08, p 3. Rather Army argues that the claims asserted against the City are based on independent acts of negligence on the part of the City and thus do not arise out of Army's operations. Army submits that the "City had a duty, independent of any contractual responsibility on the part of Army, to supervise the placement and care of the infant plaintiff within the foster care system." *Id.* at 14.

The decision in *General Insurance Company of America v. City of New York*, 2005 WL 3535113 (SDNY), is instructive here. In that case, the City moved for partial summary judgment declaring that the insurer must defend it in a separate action commenced by an infant and his grandmother against the City of New York and Talbot-Perkins Agency, a private foster care agency, for injuries sustained by the infant while in foster care. The insurer cross-moved for a declaration that it was not obligated to defend or indemnify the City in the underlying *Finch* action.

The *Finch* complaint alleged that the defendants improperly placed the infant in non-kinship foster care; failed to provide federally mandated preventive and reunification services; arbitrarily restricted visits between the infant and his grandmother; and failed to provide the infant with treatment for deafness. *See General Ins. Co. of America*, 2005 WL 3525113 at *1. The policy in that case contained an endorsement with language identical to that contained in ISO Form CG 20-26 in that the City was qualified as an additional insured "but only with respect to liability arising out of Talbot's operations." *Id.* at *7. The policy also contained a clause that excluded from coverage any bodily injury "due to the rendering of or failing to render any professional services." *Id.* at *2. The insurer disclaimed coverage for the City arguing that the *Finch* allegations concerned "actions undertaken by social workers in their professional capacities and thus fit completely within the professional services exclusion clause." *Id.* at *3. The insurer further argued that the infant's injuries did not arise out of the foster care agency's operations because the City, not the agency, initiated the course of action leading to the alleged injuries by placing the child with the agency instead of in kinship foster care with his grandmother. *Id.* In granting the City's motion for a declaration that the insurer was required to defend it, the court reasoned, "As a frontline foster care provider, Talbot was in an excellent position -- perhaps the best position -- to avoid or reduce the risk that [the infant] would be harmed while out of his family's custody." *Id.* at *7. The court further stated, "Clearly, to the extent there is liability in this case, the City's liability stems from Talbot's operations as well as its own." *Id.*

Similarly here, irrespective of whether the City had an independent duty to the plaintiffs in the underlying action, the fact remains that Army, through its contract with the City, obligated itself to provide child welfare services, including placement of children in foster homes. Furthermore, according to the allegations in the complaint and Army's own admission, the infant

plaintiff was injured while in foster care with Army's foster boarding program. Thus, Army's actions as the "frontline foster care provider" are "a central component" of the infant plaintiff's alleged injuries. *Id.* Accordingly, Army has failed to meet its burden demonstrating "that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions."

Army argues, in the alternative, that should this court find that the Agreement provides for the City's coverage as an additional insured with respect to the *Stanley* complaint, the City's motion must still be denied because the City's failure to comply with the notice requirements voids any coverage under the Agreement. The insurance provision in the Agreement required the City to notify the insurer, in this case Army, of any occurrence, offense, claim or suit "as soon as practicable." As soon as practicable has been construed to mean "within a reasonable time after the duty to give notice arises." *DiGulielmo v. Travelers Prop. Cas.*, 6 AD3d 344, 345 (1st Dept 2004). "The duty to give notice arises when, based on the information available, an insured 'could glean a reasonable possibility of the policy's involvement.' " *Id.* at 346.

The accident at issue here occurred on June 6, 2006. The City was served with a Notice of Claim in the *Stanley* action on or about August 2006. In December 2006, the City held a 50(h) hearing of plaintiff Joseph Stanley, father and natural guardian of the infant plaintiff, and on January 3, 2007, the City was served with a summons and complaint in the *Stanley* action. The City did not notify Army or Chesterfield of the incident until June 21, 2007, when it forwarded a copy of the summons and complaint and requested that defense be provided for the City. This was more than five months after it had been served with the complaint, approximately six months after it held its 50(h) hearing, and more than ten months after it was served with a Notice of Claim in the matter. Because the City has offered no excuse for why it took so long in notifying Army, its delay cannot be construed as "reasonable." *Id.* (Insured's seven month delay in giving notice unreasonable); *see also Prudential Prop. & Cas. Ins. v. Persaud*, 256 AD2d 502,

504 (2nd Dept 1998) (Insured's six month delay in providing notice found to be unreasonable as a matter of law).

It is well established, however, that even where the insured fails to provide the insurer with timely notice, the insurer has an obligation to "promptly apprise the claimant with a high degree of specificity of the ground or grounds on which the disclaimer is predicated." *See Prudential Prop. & Cas. Ins.*, 256 AD2d at 504, citing *General Acc. Ins. Group v.Ciricci*, 46 NY2d 862, 864 (1979); *see also Gagosian Gallery, Inc. v. Eurostruct, Inc.*, 10 Misc 3d 1074(A) *8, (S Ct, Kings County 2005). Here, the insurer's disclaimer, given 33 days after it received notice from the City, lacked any specificity as to the reason of the disclaimer other than that it was based on a review of the contract. Army raised the issue of late notice as a basis for its disclaimer for the very first time in October 2008, in opposition to City's motion for summary judgment and in support of its own cross-motion for summary judgment.

While insurers are encouraged to conduct investigations and gather sufficient information before issuing a disclaimer, "where the sole ground upon which the disclaimer is based is obvious from the face of the notice of claim and accompanying complaint, a delay of even 30 days has been held to be unreasonable." *Gagosian Gallery, Inc.*, 10 Misc 3d 1074(A) *8; *but cf. Ace Parking Co., Inc. v. Campbell Solberg Assoc., Inc.*, 41 AD3d 12, 15 (Where insured, served with a Notice of Claim on December 6, 2002, and with a summons and complaint in January 2003, did not provide insurer with notice of the accident or claim until June 7, 2004, First Department held that insurer's 38 day delay in denying claim was not untimely given that delay was "due entirely to plaintiff's refusal to cooperate with the adjuster in its investigation."). In *West 16th Street Tenants Corp. v. Public Service Mutual Insurance Company*, 290 AD2d 278, 279 (1st Dept 2002), the First Department, in upholding the lower court's decision granting plaintiff's motion for a default judgment on the grounds that defendant lacked a meritorious

defense, reasoned, that because the sole basis of defendant's disclaimer, untimely notice, was obvious from the face of the claim, "defendant had no need to conduct an investigation before determining whether to disclaim" and "defendant's 30-day delay in disclaiming coverage was therefore unreasonable as a matter of law." Under the same rationale, in *2833 Third Avenue Realty Assoc. v. Marcus*, 12 AD3d 329, 329 (1st Dept 2004), the First Department found that insurer's 37 day delay in issuing its disclaimer on the basis of untimely notice was unreasonable and affirmed the lower court's decision declaring that defendant insurer was required to defend its insured.

Here, the City has established that the claims alleged in the *Stanley* lawsuit arose from Army's operations. Army's disclaimer, which denied coverage based on a review of the contract, was neither timely nor specific. As such, Army is left with no basis to object to the City's belated notice. Accordingly, the City is entitled to summary judgment on its action for a declaration that Army is obligated to defend it in the *Stanley* action.

The last issue raised by the City in its motion is its entitlement to reimbursement for attorneys' fees incurred in defending itself in the *Stanley* action. The City seeks recovery of fees incurred from June 21, 2007, the date it notified Chesterfield of the claim, to date. Where it is determined that an insurer is obligated to defend its insured in an underlying action, the insurer is also obligated to reimburse its insured for any legal costs incurred in the insured's defense of the underlying action. *See, e.g., Serio v. Public Service Mut. Ins. Co.*, 7 AD3d 277, 279 (1st Dept 2004); *NYU v. Royal Ins. Co.*, 200 AD2d 527, 527 (1st Dept 2004); *ACP Services Corp. v. St. Paul Fire and Marine Ins. Co.*, 224 AD2d 961, 962 (4th Dept 1996). Accordingly, City's motion for a declaration that Army is obligated to reimburse it for attorneys' fees incurred in its defense of the *Stanley* action from June 21, 2007, to date is granted. The City shall make an application to the court for a determination of the amount to be awarded.

In light of the foregoing, it is

ORDERED that the City's motion for a declaration on summary judgment is granted; and it is further

ORDERED and DECLARED that Army must defend City in the underlying action; and it is further

ORDERED and DECLARED that Army is obligated to reimburse the City for attorneys' fees incurred in defense of the underlying action from June 21, 2007, to date; and it is further

ORDERED that the City shall make an application to the court for a determination of the amount to be awarded as reimbursement for such attorneys' fees; and it is further

ORDERED that Army's motion for summary judgment dismissing the complaint is denied.

This constitutes the decision and order of the court.

Dated: February 27, 2009
New York, New York

MATTHEW F. COOPER, J.S.C.

FILED

FILED
MAR 03 2009
NEW YORK
COUNTY CLERK'S OFFICE