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SHORT FORM ORDER

INDEX No. 06-11934
CAL. No. 10-00421-CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

MOTION DATE 4-22-10
ADJ. DATE 5-27-10
Mot. Seq. # 005 - MG; CASEDISP

MIC PROPERTY & CASUALTY CORP., Plaintiff, - against - MERQUI G. AVILA, PEDRO E. AVILA, HERMIN HILL, ALICE GORDON, HERBERT SINGLETON, KAREN SINGLETON BEARDS, AS EXECUTRIX OF THE ESTATE OF VINETTE LOUISE SINGLETON and CARLOS MOLINA, Defendants.	CUOMO, LLC Attorneys for Plaintiff 9 East 38th Street New York, New York 10016 RUBENSTEIN & RYNECKI Attorneys for Defendants Hermin Hill & Alice Gordon 16 Court Street Brooklyn, New York 11241 O'CONNOR, O'CONNOR, HINTZ & DEVENEY LLP Attorneys for Defendant Herbert Singleton One Huntington Quadrangle, Suite 3C01 Melville, New York 11747-4415 CAMPBELL & MILLER, ESQS. Attorneys for Defendant Karen Singleton Beards, as Executrix of the Estate of Vinette Louise Singleton 94 Maple Avenue, P.O. Box 901 Smithtown, New York 11787

Upon the following papers numbered 1 to 27 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (005) 1 - 6 ; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 7-20; 21-23 ; Replying Affidavits and supporting papers 24-27 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (005) by the defendant Karen Singleton Beards as Executrix of the Estate of Vinette Louise Singleton, pursuant to CPLR 3212 and Insurance Law 3420(d) for an order granting summary judgment dismissing the Amended Summons and Complaint on the basis that the notice of disclaimer issued by the plaintiff was unreasonably late as a matter of law is granted and the complaint of this action is dismissed and the plaintiff is directed to defend and indemnify in the underlying action.

MIC Property & Casualty Corp. (MIC), by Amended Summons and Complaint, seeks a declaration of rights and liabilities with regard to the automobile insurance policy number PNY 1940353 issued by MIC to Pedro Avila, a defendant in this action; declaring that MIC has no obligation, contractual or otherwise, to defend or indemnify Merqui G. Avila and Pedro E. Avila for an accident which occurred on October 3, 2005. That accident gave rise to two law suits in the Supreme Court of the State of New York, County of Nassau: Herman Hill and Alice Gordon

v Pedro Avila, Merqui G. Avila, Herbert Singleton and Carlos Molina, Index No. 05-20620, and Karen Singleton Beards as Executrix of the Estate of Vinette Louise Singleton, Deceased v Merqui G. Avila and Pedro E. Avila, Index No. 06-10988. It is claimed that Pedro E. Avila was the owner of a 1994 Acura, who permitted Merqui G. Avila to operate the vehicle. Merqui G. Avila allegedly became involved in a "drag race" with Carlos Molina on Brush Hollow Road, Westbury, New York and became involved in an accident with the vehicle owned and operated by Herbert Singleton in which Hermin Hill, Alice Gordon and Vinette Singleton were passengers. It is believed that Herbert Singleton may have sustained injury in that accident. Vinette Singleton, age 72, died in the accident. Karen Singleton Beards, as Executrix of the Estate of Vinette Louise Singleton, commenced the above noted action against the Avila defendants.

It is further asserted that on February 8, 2006, Merqui Avila entered a plea of guilty and was convicted of criminally negligent homicide in the County Court, County of Nassau, under SCI Number 283N/06, admitting he participated and was involved in a drag race/speed contest with Carlos Molina at the time of the accident. He was sentenced to and served approximately eighteen months in prison at Bare Hill Correction Facility, New York from April 6, 2006 through October 1, 2007. On December 14, 2006, Merqui was ordered to be deported and waived his appeal of the order of deportation. Upon release from Bare Hill, Merqui G. Avila was detained and taken into custody by the Department of Immigration/Department of Homeland Security and was deported on or about December 7, 2007.

On February 8, 2006, Carlos Molina entered a plea of guilty and was convicted of criminally negligent homicide in the County Court, County of Nassau, SCI Number 282N/06, admitting he participated in a drag race/speed contest with Merqui G. Avila on October 3, 2005, resulting in the death of Vinette Singleton. He was sentenced to the Adirondack Correctional Facility in New York from April 6, 2006 through October 1, 2007. On December 14, 2006, Carlos Molina was ordered to be deported and waived his appeal of the order of deportation. Upon release from Adirondack, he was detained and taken into custody by the U.S. Department of Immigration/Department of Homeland Security, and was deported on or about December 7, 2007.

MIC, upon notice of the accident and/or bodily injury claims, conducted an investigation and mailed notices of disclaimer and a reservation of rights to Merqui Avila and Pedro E. Avila, Local Brokerage, Inc., Pedro Avila's insurance broker, and to Campbell & Miller, counsel for Vinette Singleton, and to Louis N. Agresta, counsel for Merqui Avila, based upon a policy exclusion for an insured's involvement or participation in a speed contest. Because of this policy exclusion, MIC claims it is entitled to a declaration that it has no obligation, contractual or otherwise, to defend or indemnify Merqui G. Avila and Pedro E. Avila, and no obligation to any third-parties to provide coverage for the injuries alleged in the above mentioned action commenced by Hermin Hill and Alice Gordon and the action commenced by Karen Singleton Beards as Executrix of the Estate of Vinette Louise Singleton, arising out of the October 3, 2005 accident due to their insured's involvement in a speed contest.

By Decision and Order dated September 29, 2009, the Appellate Division, Second Department, reversed on the law the order dated May 6, 2008 (Costello, J.) which declared upon motion for summary judgment that MIC was not obligated to defendant or indemnify Merqui G. Avila or Pedro E. Avila in the underlying personal injury actions, Hill v Avila, Index No. 05-20620, and Beards v Avila, Index No. 06-10988, each pending in Supreme Court, County of Nassau. The Appellate Division found factual issue concerning whether Merqui's conduct fell within the exclusion as defined in the insurance policy and denied the motion for summary judgment. The Appellate Division set forth that the defendants' admissions to being engaged in a "speed contest" are not dispositive as to the meaning of the term "speed contest" in the exclusion from coverage contained in the insurance policy issued by MIC. The Court stated that "to negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case.... Any ambiguity in the exclusion is to be construed against the insurer." The Court further stated that the

policy does not define the term "speed contest" and that where the term is used in New York law, however, in Vehicle and Traffic law §1182(1), it does not encompass the conduct in which Mergui engaged here. Merely speeding down the street, even in tandem with another vehicle, does not constitute a "speed contest" within the meaning of the statute." Accordingly, the summary judgment was reversed by the Appellate Division due to factual issues. MIC did not appeal that order and the instant action is still pending.

Karen Singleton Beards, as Executrix of the Estate of Vinette Louise Singleton, now seeks summary judgment dismissing the amended summons and complaint on the basis that the disclaimer issued by MIC was untimely as a matter of law pursuant to Insurance Law 3420(d) as the disclaimer was not made by MIC until fifty one days after it was notified of the claim.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented, Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment, Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers, Winegrad v N.Y.U. Medical Center, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form, Joseph P. Day Realty Corp. v Aeroxon Prods., 148 AD2d 499 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established, Castro v Liberty Bus Co., 79 AD2d 1014 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law, Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]).

In support of this motion, the moving defendant has submitted, inter alia, an attorney's affidavit; letter of representation of the Estate of Vinette Louise Singleton v. Avila, Molina and Singleton, by Edwin Miller sent to Merqui Avila dated October 7, 2005; copy of the supplemental summons and amended verified complaint; a copy of the insurance policy issued by MIC to Pedro Avila; a copy of the pleadings in the underlying action; a copy of the plea disposition by defendants Molina and Avila taken before the Hon. Richard A. LaPera, dated February 8, 2006; copy of a letter dated October 12, 2005 from GMAC Insurance to Mr. Agresta re: reservation of rights based upon the policy exclusion for drag racing; copy of a letter dated October 12, 2005 from GMAC Insurance to Mr. Miller re: reservation of rights based upon the policy exclusion for drag racing; letter of October 11, 2005 from GMAC Insurance to Pedro Avila; letter of October 11, 2005 from GMAC Insurance to Merqui Avila; letter of October 11, 2005 from GMAC Insurance to Local Brokerage re: reservation of rights based upon the policy exclusion for drag racing; letters dated November 22, 2005 from GMAC Insurance re: denial and disclaimer of coverage to to Campbell & Miller, Louis Agresta, Pedro Avila, Rubenstein & Rynecki; and a copy of the Decision and Order of the Appellate Division Second department dated September 29, 2009.

In opposing this motion, the plaintiff has submitted the affidavits of John Novak, Calvin Craig dated June 14, 2007; copies of the pleadings; copy of the insurance policy issued by MCU to Pedro Avila; affirmation of Sherri Jayson; affirmation of Edwin Miller; copy of defendant-appellant brief; plaintiff-respondent brief and Reply; uncertified copy of the MV 104 Police Accident Report; letter of October 7, 2005 from Edwin Miller to Merqui Avila, and letter of October 12, 2005 from GMAC Insurance to Mr. Argesta; and various affirmations and copies

of briefs concerning the previous appeal on the issue of whether MIC is not obligated to the rights of any third-parties due to the issue that speed racing is excluded by the applicable insurance policy.

In his supporting affidavit, Edwin Miller, counsel for the defendant Karen Singleton Beards, as Executrix of the Estate of Vinette Louise Singleton avers that the date of the accident giving rise to the underlying actions was October 3, 2005. The decedent, who died several hours after the accident, was a passenger in the vehicle driven by her husband, Herbert Singleton, when their car was struck in the right passenger side by the vehicle being driven by the defendant Merqui G. Avila and owned by his brother, Pedro Avila. A claim letter dated October 7, 2005 was sent to Merqui Avila from the affiant's office. On October 11. 2005, the plaintiff, MIC, insurer for the vehicle owned by Pedro Avila, issued a reservation of rights letter reserving its right to disclaim coverage in the future. On November 22, 2005, MIC, issued a disclaimer letter to their insured and all other parties and their attorneys based on a "speed contest" exclusion in the automobile liability policy issued to Pedro Avila.

John Novak, a senior claims adjuster for GMAC Insurance, the parent company of the plaintiff corporation, MIC Property & Casualty Corp. has submitted an affidavit in opposition to the moving defendants' motion. It is noted that John Novak does not aver that he is a claims adjuster or is otherwise employed by the separate corporate entity, MIC. Mr. Novak avers that MIC first learned on October 4, 2005 of the within accident involving Pedro Avila's vehicle when Mr. Avila notified the claims call center by phone that his vehicle was involved in the loss. On October 5, 2005 an MIC representative spoke with Pedro Avila by telephone and was advised that Merqui Avila unavailable and it was not known when he would be available, however, he states, MIC was not advised that Merqui Avila was arrested. On October 10, 2005, MIC received a copy of the police accident report. On October 11, 2005, MIC received the letter of representation from Edwin Miller, Esq. "directed to" Merqui Avila. Mr. Novak states that in light of MIC's investigation and the representations in that letter that it issued a reservation of rights letter dated October 11, 2005 to Mr. Miller based upon the indication that the loss may have occurred as a result of a "drag race." It is noted that on October 12, 2005, MIC learned that Merqui Avila had been arrested. MIC sent a letter to his attorney, Louis Agresta, Esq., advising of the coverage issues due to Mr. Avila's involvement in a contest of speed and requested an examination under oath, which counsel would not agree to until the completion of the criminal matter. In November 2005, MIC sought legal counsel with respect to the matter and advisement as to whether disclaimer was to be issued. On November 22, 2005, MIC denied and disclaimed coverage.

Calvin P. Craig, Jr. sets forth in his affidavit that MIC is the company which issues the insurance policy, and GMAC oversees and manages the claims MIC receives. He states that GMAC is not an insurer and does not issue insurance policies but reviews claims received by MIC. He supervises John Novak. Mr. Craig does not set forth why a affidavit has not been provided from an employee of MIC in opposition to the instant motion and does not aver that either he or Mr. Novak are employees of MIC, the plaintiff in this action.

Insurance Law 3420(d)(2) provides that "If under a liability policy issued or delivered 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."

If an insurer intends to disclaim liability or deny coverage for any incident, it must give written notice of disclaimer as soon as it is reasonably possible to do so. However, the insurer will be estopped from denying coverage if the notice of such denial or disclaimer of liability is unreasonably delayed, see, Commerical Untion Insurance Companies v Jedamich Enterprises, Inc. et al, 146 AD2d 599 [2nd Dept 1989].

"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. 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 Company v Jetco Contracting Corp., 1 NY3d 64 [2003]. Time for notice should be measured from the moment the insurer first learns of the accident or of grounds for its disclaimer and not from the time when it chooses to disclaim, Allstate Insurance Company v Gross et al, 27 NY2d 263 [1970]. The letter of October 12, 2005 from John Novak of GMAC Insurance[1] sent to Mr. Argenta, attorney for Merqui Avila, sets forth that his investigation has revealed this accident was the result of an "alleged speed contest involving your client." Mr. Novak set forth in his affidavit that in light of MIC's investigation and the representations in the October 11, 2005 letter of representation from Edwin Miller, Esq. directed to Merqui Avila. that it issued a reservation of rights letter dated October 11, 2005 based upon the indication that the loss may have occurred as a result of a "drag race." Therefore, on October 11, 2005, Mr. Novak indicated the loss may have been a result of a drag race, and on October 12, 2005, in his letter to Mr. Argenta, Mr. Novak indicates that his investigation revealed that the accident was the result of an "alleged speed contest" and advised Mr. Argenta that "We do no provide Liability Coverage for the ownership, maintenance or use of: 4. Any vehicle, including your insured car, while used in or preparing for any race, speed contest or performance contest." It is therefore determined that on October 11, 2005, Mr. Novak had notice of the basis for the disclaimer pursuant to the terms of Pedro Avila's insurance policy and the facts asserted in his letters.

Based upon the foregoing, it is determined that there is a minimum of forty-three days in which MIC delayed issuing its letter of disclaimer.

A carrier waives its affirmative defense of late notice if it fails to disclaim coverage as soon as is reasonably possible, as required by Insurance Law 3420(d), after it first learns of the grounds for disclaimer of liability or denial of coverage. It is the responsibility of the insurer to explain its delay, and an unsatisfactory explanation will render the delay unreasonable as a matter of law, Pennsylvania Lumbermans Mutual Insurance Company v D & Sons Construction Corp. et al, 18 AD3d 843 [2nd Dept 2005].

In the instant action Mr. Novak, although learning of the drag racing on October 11, 2005, and advising Mr. Miller and Mr. Argenta on October 12, 2005 that the policy excluded coverage for "speed racing," MIC did not send out a disclaimer letter. Mr. Novak then waited until November 2005 to seek legal counsel with respect to the matter and advisement as to whether disclaimer was to be issued. There is no reasonable explanation for the delay from October 11, 2005 until November 22, 2005 when the disclaimer was issued.

Although Mr. Novak advised the parties of the reservation of rights, in Hartford Insurance Company v County of Nassau, 46 NY2d 1028 [1979], the Court of Appeals stated that a reservation of rights letter holds no relevance to the question of whether appellee had timely sent a notice of disclaimer of liability or denial of coverage; that the appellee bore the responsibility to reasonably explain the delay; that the court should not engage in speculation as to what might have happened in order to remedy a failure of proof; and found that a delay of two months was unreasonable and did not comply with New York Insurance Law concerning a valid disclaimer of liability.

A delay of forty-seven days was found unreasonable in Generali-US Branch v Rothschild,295 AD2d [2002]. In First Financial Insurance Company v Jetco Contracting Corp., the Court of Appeals held that a delay of forty-eight days in issuing a disclaimer was unreasonable as a matter of law. In West 16th St. Tenants Corp. v Public Serv. Mut. Ins. Co, 290 AD2d 278 [1st Dept. 2002], a thirty-day delay in disclaiming coverage was determined to be

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[1] This letter was sent from GMAC Insurance. However, Mr. Craig has set forth in his affidavit that GMAC is not an insurer and does not issue insurance policies

unreasonable as a matter of law. In the Matter of New York Central Mutual Fire Insurance Company v Steiert, et al, 68 AD3d 1120 [2nd Dept 2009], where Kemper acquired facts entitling it to disclaim on January 2, 2002, its duty to provide prompt notice was triggered, and its failure to disclaim coverage until February 27, 2002 was unreasonable as a matter of law where no valid excuse was established, A thirty-four day delay was found unreasonable as a matter of law where no explanation for that delay in disclaiming coverage was established in Sirius America Insurance Company et al v Vigo Construction Corp. et al, 48 AD3d 450 [2nd Dept 2008].

Here, it is determined that MIC knew of the basis for disclaimer on October 11, 2005. On November 22, 2005, forty- three days later, MIC issued its disclaimer of coverage. No reasonable explanation has been provided by MIC for the forty-three day delay in issuing its disclaimer letter. In that an unsatisfactory explanation for the delay has been offered by MIC, this Court finds that the forty-three day delay was unreasonable as a matter of law, see, Moore v Ewing, 9 AD3d 484 [2nd Dept 2002]; Republic Franklin Ins. Co. v Pistilli, 16 AD3d 477 [2nd Dept 1993].

Although MIC argues that the defendant Beards has waived any argument with respect to the timeliness of the disclaimer and is estopped from contesting the same, MIC has produced no written waiver and MIC has not previously moved for judgment declaring its denial of coverage was timely although it had ample opportunity to do so. Further, MIC's argument that Beards did not deny paragraph 36 of the amended complaint that MIC conducted an investigation and learned that Merqui Avila was involved in a drag race/speed contest is without merit as MIC's letter of October 11, 2005 indicates the same as does Mr. Miller's letter of October 7, 2005. That MIC issued a disclaimer based upon a speed race is without question with regard to MIC's contentions in paragraph 37 of the amended complaint. Therefore, denial would not have been appropriate as a disclaimer had been sent.

What is conspicuously absent from MIC's complaint is the assertion that the disclaimer was timely issued. MIC seeks declaratory judgment only on the issue that it has no obligation to any third-parties based upon the policy exclusion for an insured's involvement or participation in a speed contest. The complaint does not seek declaratory relief on the issue of timeliness of the disclaimer and therefore the defendant has no obligation to raise an affirmative defense that is not in response to the gravamen of the complaint.

Accordingly, motion (005) is granted.

Dated: June 15, 2010

Ralph J. Gretell
J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**