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

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

Index Number : 116061/2008

QBE INSURANCE CORPORATION

VS.

ZURICH AMERICAN INSURANCE COMPANY

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 is determined in accordance with the annexed decision and order.

FILED
JUL 23 2010
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: July 15, 2010

HON. JOAN A. MADDEN J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

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

----------X

QBE INSURANCE CORPORATION,

Plaintiff,

Index # 116061/08

-against-

ZURICH AMERICAN INSURANCE COMPANY,

Defendant.

JOAN A. MADDEN, J.:

In this breach of contract action, plaintiff QBE Insurance Corporation (QBE) moves, pursuant to CPLR 3212, for summary judgment requiring that defendant Zurich American Insurance Company (Zurich) reimburse QBE in the amount of $50,000 plus statutory interest and one half of the attorneys' fees, costs and disbursements that QBE expended in excess of its contractual/equitable obligation in the defense and ultimate settlement of a certain underlying personal injury action (the Sumba action). QBE also seeks an order granting it attorneys' fees and costs in this breach of contract action.

Zurich opposes QBE's motion, and cross-moves, pursuant to CPLR 3212, for summary judgment declaring that it has no duty to reimburse QBE for any part of the amount QBE paid to settle the Sumba action, or alternatively, declaring that Zurich is entitled to a reasonableness hearing on QBE's claims and Zurich's counterclaims.

The Sumba Action

In November 2002, Sumba was injured while performing construction work at a building owned by Clermont Park Associates, LLC (Park) located at 65 Clermont Avenue in Brooklyn. Park leased the premises to Clermont Residence, LLC (Residence). Sumba commenced a

personal injury action against Park, which was insured by QBE. In October 2004, Park commenced a third-party action against Residence, which was insured by Zurich, seeking a declaration that, pursuant to the lease between Park and Residence and the commercial general liability policy Zurich issued to Residence and Park,[1] Residence and Zurich were obligated to defend and indemnify Park against the claims asserted by Sumba..

On August 13, 2008, QBE and Zurich entered into a settlement agreement to resolve the third-party action. The settlement agreement states, in pertinent part:

> This will serve to memorialize the terms of the settlement agreement, reached on July 14, 2008, whereby Zurich agrees to split the defense and indemnification of Clermont Park in the underlying Sumba action on a 50-50 basis with Clermont Park's insurer, QBE Insurance Company up to the limits of the Zurich policy[2]. Pursuant to this agreement, Zurich will share in Clermont Park's reasonable defense costs and expenses on a going forward basis, only, as of the date this agreement was reached. Clermont Park will promptly discontinue its declaratory judgement action against Zurich, with prejudice.

Thereafter, in an attempt to settle the Sumba action, the parties entered into mediation and although the mediator recommended a settlement in the amount of $600,000, Zurich offered to contribute only $50,000 based on its belief that there was a question of liability. Accordingly, the parties were unable to reach a settlement agreement during mediation.

On the day prior to the start of the Sumba trial, QBE, once again, attempted to convince Zurich to settle the matter. By this time, Zurich had offered to contribute a maximum of $200,000 to any settlement which, based on the August 2008 agreement, would result in a settlement offer of $400,000. In QBE's estimation, that offer would be insufficient to settle the case and in a letter to Zurich dated September 17, 2008, QBE stated, in pertinent part:

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[1] Park was an additional insured under the commercial general liability policy that Zurich issued to Residence.

[2] The Zurich policy at issue had liability limits of $1,000,000 per occurrence.

> If Zurich is convinced that the jury will not return a verdict in excess of $400,000, then it is Zurich alone that ought to assume the risk of the jury trial. Zurich's refusal to contribute its one-half coinsurance to a $600,000 settlement is exposing both our client Clermont Park Associates and QBE Insurance Corporation to a verdict in excess of that amount and perhaps in excess of both QBE and Zurich policies' limits. Due to this concern, QBE is willing to come to some arrangement that would bring about a settlement. QBE offered that it would pay the $300,000 previously authorized toward any verdict, but no more. In other words, if you are correct that the exposure does not warrant a $600,000, settlement and the jury returns a verdict of, for example, $300,000, then QBE is willing to pay that full amount without contribution from Zurich. On the other hand, if the jury returns a verdict of $800,000, QBE will still pay what it legitimately agrees should be its share of this loss –$300,000- and Zurich will pay the rest. Therefore, if Zurich is willing to gamble on a jury verdict, it should bear the risk of that gamble.

Zurich refused QBE's September 17th offer.

Shortly after the trial began, Sumba reduced his settlement demand to $500,000. Although Zurich continued to maintain that it was only prepared to contribute $200,000, QBE ultimately agreed to pay the additional $300,000 in order to settle the case for $500,000. QBE reserved its rights, on the record, to seek reimbursement from Zurich for the $50,000 it believed it was owed from Zurich, pursuant to the August 2008 stipulation.

The Instant Action

On December 2, 2008, QBE commenced the instant action against Zurich to recover the $50,000 it alleges Zurich owes it pursuant to the August 2008 settlement agreement wherein Zurich agreed to split the cost of the defense and indemnification of Park with QBE on a 50%-50% basis. Zurich has counterclaimed, alleging that QBE breached the "consent to settle" provision in the policy Zurich issued to Park.

In support of its motion for summary judgment and in opposition to the cross-motion, QBE contends that the parties entered into an agreement to split the reasonable defense and indemnification costs on a 50%-50% basis; that the $500,000 settlement in the Sumba action was

reasonable; that Zurich did not contest the reasonableness of the settlement on the record; and that under the principles of equitable subrogation, Zurich is required to reimburse QBE for the $50,000 that QBE paid in excess of August 2008 settlement agreement.

In opposition to QBE's motion for summary judgment and in support of its cross-motion, Zurich argues that the "consent to settle" provisions in Zurich's policy preclude QBE's claim; that QBE was acting as a volunteer by making the $50,000 payment above its co-insurance obligation; and that, at minimum, a question of fact exists as to the reasonableness of the settlement, which precludes summary judgment.

Summary judgment will be granted if it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The burden is on the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman v City of New York,* 49 NY2d at 562). Mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion (*Zuckerman v City of New York,* 49 NY2d at 562).

In this case, QBE has made a prima facie showing that it is entitled to judgment as a matter of law by demonstrating through admissible evidence that, pursuant to the August 2008 settlement agreement, Zurich agreed to "split the defense and indemnification of Clermont Park in the underlying Sumba action on a 50-50 basis with Clermont Park's Insurer, QBE Insurance Company," and in that same agreement, Zurich stated that it would, "share in Clermont Park's reasonable defense costs and expenses on a going forward basis." Moreover, QBE has

introduced evidence that the judge presiding at the Sumba trial deemed "the $500,000 settlement . . . a fair and reasonable settlement considering the aspects of the facts of the case, and the injuries sustained, and the permanency of the injury." The record also reveals that, although Zurich only offered $200,000 to settle the Sumba action, it did not specifically object to the $500,000 settlement amount.

In addition, in support of its argument that it is entitled to reimbursement under the principle of equitable subrogation, QBE has submitted evidence detailing the extent of Sumba's injuries to demonstrate that it did not pay more than its fifty percent share as a mere volunteer, but rather made the payment for the protection of its own interests and in discharge of an existing liability because it reasonably believed, according to its research, that the potential liability in the Sumba matter exceeded $500,000 (see *Gerseta Corp. v Equitable Trust Co. of New York,* 241 NY 418, 425-426 [1926]; *Mid-City Shopping Center v Consolidated Mut. Ins. Co.,* 35 AD2d 1053 [3d Dept 1970]).

Zurich has failed to come forward with evidence in admissible form to overcome QBE's prima facie case. Zurich's argument that the "consent to settle provisions" in the subject insurance policy preclude QBE's recovery is without merit. The Zurich policy contains Commercial General Liability Coverage Form CG 00 01 10 01, which states in relevant part:

> **SECTION IV–COMMERCIAL GENERAL LIABILITY CONDITIONS**
>
> * * *
>
> c. You and any other involved insured must:
>
> * * *
>
> (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and
>
> * * *
>
> d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.
>
> **3. Legal Action Against**

> No person or organization has a right under this Coverage Part:
> a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or
> b. To sue us on this Coverage Part unless all of its terms have been fully complied with.
>
> A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative

It is not disputed that QBE and Zurich were co-insurers in the Sumba action and thus the "consent to settle" provision in Zurich's policy, which prohibits an *insured* from making a payment without Zurich's consent is inapplicable. Because QBE and Zurich co-insured Park, and were co-insurers of the same risk, each is responsible for its proportional share of the amount paid (see *Puritan Ins. Co. v Continental Cas. Co.*, 195 AD2d 291, 292 [1st Dept 1993]; *Zurich-American Ins. Cos. v Atlantic Mutual Ins. Cos.*, 139 AD2d 379 [1st Dept 1988], affd 74 NY2d 621 [1989]).

In this case, QBE and Zurich entered into an unambiguous written agreement "to split the defense and indemnification of . . . Park in the underlying Sumba action on a 50-50 basis." An agreement that is clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). Thus, the parties unequivocably agreed to split reasonable defense and indemnification costs 50-50.

Zurich's alternative argument that a question of fact exists as to whether the settlement in the Sumba action was reasonable, is equally without merit. Judge Gerald Held, the judge in the Sumba action, stated on the record that, "[i]t's the opinion of this Court, . . . that the $500,000 settlement is a fair and reasonable settlement considering the aspects of the facts of the case, and

the injuries sustained, and the permanency of the injury." In *City of New York v Zurich-American Insurance Group*, (5 Misc 3d 1008[A], 2004 NY Slip Op 51273 [U], *5 [Sup Ct, Kings County 2004], affd 27 AD3d 609 [2d Dept 2006]), the court found that no post hoc issue could be raised as to the amount of the settlement where the judge noted, on the record, that the settlement agreed to by the parties was "entirely reasonable." In addition, although given an opportunity by Judge Held to comment on the settlement, Zurich failed to object to the amount of the settlement on the record (see *Tishman Constr. Corp. of N.Y. v American Mfrs. Mut. Ins. Co.*, 303 AD2d 323, 324 [1st Dept 2003] [defendant not entitled to hearing on the underlying settlement because it did not challenge the reasonableness of the settlement in the proceedings before the court]).

Based on the foregoing, the court concludes that plaintiff QBE Insurance Corporation is entitled to summary judgment on its breach of contract claim against defendant Zurich American Insurance Company, in the amount of $50,000.

QBE is also seeking summary judgment on is claim for one half of the attorneys' fees, costs and disbursements that it expended in excess of its contractual/equitable obligation in the defense and ultimate settlement of the Sumba action. In light of the determination above, QBE is entitled to partial summary judgment as to liability alone on that claim, and a hearing is necessary to determining the reasonable amount of such attorney's fees, costs and disbursements incurred by QBE after August 13, 2008 in connection with the Samba action.

Accordingly, it is

ORDERED that plaintiff QBE Insurance Corporation's motion for summary judgment on its breach of contact claim is granted, and QBE Insurance Corporation is entitled to a judgment

in the amount of $50,000 against defendant Zurich American Insurance Company, together with interest as computed by the Clerk; and it is further

ORDERED that plaintiff QBE is entitled to partial summary judgment as to the issue of liability on its claim for one-half of the attorneys' fees, costs and disbursements it incurred after August 13, 2008 in connection with the Samba action, and a hearing is directed to determine the reasonable amount of such fees, costs and disbursements; and it is further

ORDERED that plaintiff QBE Insurance Corporation's claim for attorney's fees, costs and disbursements is severed and on or before August 20, 2010, plaintiff shall file a copy of this order with notice of entry, a note of issue and a statement of readiness, upon the Clerk of the Trial Support Office (Room 158), and shall pay the proper fees, if any, and said Clerk shall there upon place this action on the appropriate calendar for the assessment herein above directed; and it is further

ORDERED that if plaintiff fails to file the note of issue in compliance with the immediately preceding paragraph, the claim for attorney's fees, costs and disbursements will be dismissed; and it is further.

ORDERED that defendant Zurich American Insurance Company's cross-motion for summary judgment is denied in its entirety.

The court is notifying the parties by mailing copies of this decision and order.

DATED: July 15, 2010

ENTER:

J.S.C.