SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **07**

Justice

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INDEX NO. 403087/2002

BROOKLYN UNION GAS COMPANY,

MOTION SEQ. NO. 039

Plaintiff,

- v -

DECISION + ORDER ON MOTION

CENTURY INDEMNITY CO and MUNICH REINSURANCE AMERICA INC,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 039) 254, 255, 256, 257, 258, 259, 260

were read on this motion to/for MISCELLANEOUS.

Covington & Burling LLP, Washington, D.C. (Jay T. Smith, Eric Bosset and Michael Lechliter of counsel), and San Francisco, CA (Gretchen Hoff Varner of counsel), for plaintiff.
O'Melveny & Myers LLP, New York, NY (Jonathan Rosenberg and Leah Godesky of counsel), and Los Angeles, CA (Daniel Petrocelli and Craig P. Bloom of counsel), for defendant Century Indemnity Company.
No appearance for defendant Munich Reinsurance America Inc.

Gerald Lebovits, J.:

This decision addresses pre-trial motions filed by the parties in 21-year-old insurance-coverage litigation between Brooklyn Union Gas Company and Century Indemnity Company. Decades ago, Brooklyn Union purchased a number of excess insurance policies from Century. Brooklyn Union is now seeking coverage under those policies for the (vast) costs of remediating environmental damage at the sites of several former manufactured-gas plants (MGPs) in New York City, including one located next to the Gowanus Canal in Brooklyn.[1]

The parties anticipate that multiple trials will be required in this litigation to cover all of the MGP sites at issue. The first of those trials is scheduled to begin in late-March 2022. In

[1] The parties' litigation comprises two separate actions before this court: this action and *Century Indemnity Co. v Brooklyn Union Gas Co.*, Index No. 603405/2001. The motions in limine filed in the two actions overlap almost completely. (This motion is motion sequence 042 in the *Century Indemnity* docket.)

preparing for trial, the parties have filed numerous motions in limine.[2] This decision addresses motion sequence 039 in this action: Century's motion to preclude Brooklyn Union from submitting evidence or arguing to the jury that Century waived, after July 9, 2001, its right to disclaim coverage on the ground that Brooklyn Union's notice to Century of a covered occurrence was untimely.

The motion is denied.

BACKGROUND

As discussed in this court's prior motion-in-limine decision, the parties will likely contest at trial whether Brooklyn Union's notice to Century of a covered occurrence was timely, because timely notice is a condition of coverage. At the same time, an insurer may by its conduct waive an otherwise-meritorious timeliness defense. (*See Long Is. Lighting Co. v. American Re-Ins. Co.*, 123 AD3d 402, 403-404 [1st Dept 2014].)

The parties' dispute on this motion is framed by prior waiver-related motion practice in this action. Century had moved for partial summary judgment, seeking, in effect, a declaration that (i) Century did not waive its late-notice defense; and (ii) Century did not owe Brooklyn Union coverage for several million dollars in environmental-remediation costs that Brooklyn Union had agreed to incur without first having obtained Century's consent. This court granted the motion in part and denied it in part in an order issued in July 2018. (*See* NYSCEF No. 143.)

On waiver, this court denied summary judgment. The court held that "Brooklyn Union has raised a material issue of fact about when Century knew it had a potential late-notice defense and whether Century manifested an intent not to assert it, for example, by raising other defenses while failing to raise the late-notice defense." (*Id.* at 14.)

On consent-to-settle, this court granted summary judgment. (*See id.* at 14-15.) The court concluded that Brooklyn Union was required to comply with the consent-to-settle provision in the Century excess policies unless Century repudiated those policies altogether; and that Century's conduct in this case did not clear the high bar for finding such repudiation set by the First Department in *Seward Park Housing Corp. v Greater New York Mutual Insurance Co.* (43 AD3d 23, 30-32 [1st Dept 2007]). Absent repudiation, Brooklyn Union's failure to obtain consent from Century for the settlement in which Brooklyn Union agreed to assume millions in remediation costs precluded coverage for those costs. (*See* NYSCEF No. 143 at 14-15.)

Century did not appeal this court's denial of summary judgment on waiver. (*See* Appeal Br. for Century Indemnity, Index No. 603405/2001, NYSCEF No. 898, at 1 [Questions Presented], 8-17 [describing issues on appeal].[3]) On Brooklyn Union's appeal from this court's

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[2] For this court's decision on an earlier motion in limine, see *Century Indemnity Co. v Brooklyn Union Gas Co.* (2022 NY Slip Op 22026 [Sup Ct, NY County 2022]).

[3] The parties' motion briefing in this action largely incorporates by reference their briefing in the *Century Indemnity* action. (*See* NYSCEF Nos. 255-257.) This decision's citations to filings therefore largely refer to the *Century Indemnity* docket.

consent-to-settle ruling, the First Department modified to deny summary judgment on that issue. (*Century Indem. Co. v Brooklyn Union Gas Co.*, 170 AD3d 632, 633 [1st Dept 2019].) The Court held that "Century's commencement of this litigation constituted a repudiation of liability under the policies for the remediation claims against Brooklyn Union," thereby relieving Brooklyn Union of its consent-to-settle obligation. (*Id.*)

The current motion concerns how to interpret this 2019 First Department decision. Century contends that the First Department, in holding that the commencement of this action in 2001 repudiated liability under the Century policies, has necessarily foreclosed a claim that Century waived a late-notice defense by post-2001 conduct. Century seeks to bar Brooklyn Union from making a waiver argument at trial with respect to that conduct.

Brooklyn Union argues, on the other hand, that the First Department held merely that bringing this action constituted a disclaimer of coverage, preserving only defenses to liability raised in the pleadings. According to Brooklyn Union, this court already held in its July 2018 order that whether Century's July 2001 pleadings in this action sufficed to preserve its late-notice defense presents a dispute of fact that Brooklyn Union may properly argue to the jury.

This court concludes that Brooklyn Union has the better reading of this court's July 2018 order and the First Department's 2019 modification of that order. Century's motion to preclude is denied.

DISCUSSION

I. Construing the First Department's Decision on Appeal from this Court's July 2018 Order

Century's principal argument in support of its motion is straightforward: The First Department held in 2019 that Century's bringing this action in July 2001 "constituted a repudiation of liability under the policies." (*Century Indemnity*, 170 AD3d at 633.) And, Century contends, if it repudiated liability altogether in July 2001, Century cannot have waived a defense to coverage liability by conduct *after* July 2001. (*See* Index No. 603405/2001, NYSCEF No. 863 at 9-10.) But the matter is not as simple as Century would have it. Rather, determining the import of the First Department's statement for the question of post-2001 waiver entails a close look at this court's July 2018 order, the parties' arguments on Brooklyn Union's appeal from the consent-to-settle aspect of that order, and the First Department's full discussion of that branch of the appeal.

This court's order granting Century's motion on the consent-to-settle issue rested on two premises. *First*, only a full repudiation of liability by an insurer—not merely an ordinary disclaimer of coverage—will "excuse[] an insured from further performance of conditions precedent under the policy." (NYSCEF No. 143 at 14.) Repudiation, properly speaking, "requires an anticipatory breach, such as when an insurer 'immediately and summarily' rejects an insured's claims and proofs of loss.'" (*Id.* at 14-15, quoting *Seward Park*, 743 AD3d at 32; *see also Beckley v Otsego County Farmers Coop. Fire Ins. Co.* (3 AD2d 190, 192-194 [3d Dept 1957] [holding that a reasonable jury could find repudiation where only "a few days" after the

insurer received a claimed loss due to fire, the insurer notified the insured that it was refusing to pay because the insurer suspected that the insured had himself started the fire].)

Second, Century's actions, including spending "years communicating with Brooklyn Union and investigating its MGP claims" before bringing a declaratory judgment action, did not constitute the kind of "immediate[e] and summar[y]" rejection of those claims required to constitute a full repudiation of liability under *Seward Park*. (*Id.* at 15.) Brooklyn Union's consent-to-settle obligation under the policies therefore remained—foreclosing coverage for unconsented-to settlement costs. (*See id.*)

Given the reasoning of this court's order, Brooklyn Union had three paths available to challenge it on appeal: (i) argue that an ordinary disclaimer of coverage (not just a full *Seward Park*-style repudiation) is sufficient to excuse performance; (ii) argue that Century's conduct between 1993 and 2001 did constitute a repudiation of that type; (iii) make both arguments. Brooklyn Union picked door number one.

On appeal, Brooklyn Union argued that this court erred in granting summary judgment on the consent-to-settle issue because "a policyholder need not seek the insurer's consent to settle a claim for which the insurer has already denied coverage." (Opening Br. for Brooklyn Union, *Century Indemnity* [2018 appeal], Index No. 603405/2001, NYSCEF No. 871, at 16; *see also id.* at 17 [citing cases holding that consent from an insurer is not required where the insurer has denied or disclaimed liability under the policy].) Brooklyn Union argued that this court erred in relying on *Seward Park* because that decision was inapposite in the consent-to-settle context; and that instead, the court should have followed other New York decisions "holding that a disclaimer of coverage is sufficient to relieve a policyholder of any obligation to seek an insurer's consent to settlement." (*Id.* at 21-22.)

Century's responsive brief directly joined issue with the challenge to this court's order as Brooklyn Union had framed it. Century contended that "a disclaimer" of coverage "does not relieve a policyholder from the obligation to comply with policy conditions." (Response Br. for Century, *Century Indemnity* [2018 appeal], Index No. 603405/2001, NYSCEF No. 898, at 18.) The insurer "must outright *repudiate* the policy" within the meaning of *Seward Park*. (*Id.* at 18-19 [emphasis in original].) Century argued that since it undisputedly had not committed that type of repudiation, Brooklyn Union "remained obligated . . . to comply with the terms of the policies," including their consent-to-settle requirement. (*Id.* at 21.)

As discussed above, the First Department modified this court's ruling to hold that Century's bringing this action "constituted a repudiation of liability under the policies for the remediation claims against Brooklyn Union." (170 AD3d at 633.) It therefore was unnecessary for Brooklyn Union to have sought or obtained consent to the remediation-costs settlement.

The question before this court now, according to the parties, is what to make of the First Department's modification of this court's July 2018 order. This court concludes that although the First Department's ruling was phrased in terms of a "repudiation of liability," Century's interpretation of that ruling is less persuasive than Brooklyn Union's.

The parties did not dispute this court's conclusion in its July 2018 order that Century's conduct between 1993 and 2001 fell short of full repudiation within the meaning of *Seward Park*. Given that the First Department modified this court's ruling, rather than fully affirming it, it follows that the Court was holding that *Seward Park*-style repudiation was not required to excuse Brooklyn Union from its consent-to-settle obligation.

Indeed, the First Department's decision did not cite (or mention) *Seward Park*. The Court relied only on *J.P. Morgan Sec. Ins. v. Vigilant Ins. Co.* (151 AD3d 632, 633 [1st Dept 2017]) and *AJ Contr. Co. v. Forest Datacom Servs.* (309 AD2d 616, 617–618 [1st Dept 2003]). (*See* 170 AD3d at 633.) Neither decision addressed a scenario in which the insurer had "immediately and summarily" rejected the insured's claims or totally repudiated the underlying policy. (*Seward Park*, 43 AD3d at 32.) In each case the insurer had expressly or implicitly taken the position that the insurer was not liable under the policy for a particular claim—a "denial of liability" (*Vigilant Insurance*, 151 AD3d at 633) or a "disclaimer of liability" (*Forest Datacom*, 309 AD2d at 616-617).

In short, the best reading of the First Department's 2019 *Century Indemnity* decision is that the Court held only that Century's commencing this action constituted a sufficiently clear disclaimer of its liability on Brooklyn Union's claims as to excuse Brooklyn Union from needing to seek Century's consent to settle a related remediation claim.

A disclaimer, unlike a true repudiation, is not "an all-or-nothing proposition." (Index No. 603405/2001, NYSCEF No. 894 at 9.) Failure to plead a particular ground for disclaimer in a declaratory-judgment complaint may waive the right to deny coverage on that ground.[4] (*See Farm Family Casualty Ins. Co. v Henderson*, 179 AD3d 1193, 1195 n 1 [3d Dept 2020], citing *General Acc. Ins. Group v Cirucci*, 46 NY2d 862, 864 [1979].) The question whether Century's pleadings in this action did (or did not) sufficiently preserve Century's late-notice defense remains.

II. The Proper Scope of the Dispute Between the Parties on this Motion

Century contends, in effect, that as a matter of law its pleadings in this action *did* sufficiently articulate the late-notice defense, foreclosing Brooklyn Union's post-2001 waiver argument. (*See* Index No. 603405/2001, NYSCEF No. 863 at 10-11.) The law of the case doctrine, however, bars consideration of this argument on the current motion.

[4] For this same reason, there is no merit in Century's argument that Brooklyn Union is judicially estopped from raising a post-2001 waiver argument. (*See* Index No. 603405/2001, NYSCEF Nos. 863 at 11-13, 894 at 8-9.) Judicial estoppel does not apply absent inconsistent legal positions. (*See Becerril v. City of NY Dept. of Health & Mental Hygiene*, 110 AD3d 517, 519 [1st Dept. 2013].) No inconsistency exists between Brooklyn Union's arguing on the prior appeal that Century's pleadings in this action constituted a disclaimer of coverage and Brooklyn Union arguing now that Century's pleadings operating as a disclaimer in turn has waiver-related consequences.

This Court already held in its July 2018 order that a material dispute of fact exists about whether Century's post-1993 conduct—including filing this declaratory-judgment action in 2001—constituted a waiver of the late-notice defense to coverage. (*See* NYSCEF No. 143 at 13-14.) Century did not challenge that aspect of the July 2018 order on appeal. Century does not provide a reason why this court should depart from that holding now.[5] And to the extent that Century is arguing instead that this court's July 2018 order did not decide the matter because Century's post-2001 conduct was not put before this court on the prior motion (*see* Index No. 603405/2001, NYSCEF No. 894 at 5-6), this court disagrees. (*See* Index No. 603405/2001, NYSCEF No. 292 at 26-27; NYSCEF No. 426 at 21-22.)

Accordingly, for the foregoing reasons, it is hereby

ORDERED that Century's motion in limine is denied.

2/4/2022
DATE

HON. GERALD LEBOVITS
J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

[5] To be sure, for the reasons articulated above in Point I, it would be a different case had the First Department held on the ensuing appeal that Century's conduct constituted a full repudiation of the underlying excess policies. But the First Department did not hold that.