SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

----------X

COUNTRY-WIDE INSURANCE COMPANY

Plaintiff,

- v -

ZURICH AMERICAN INSURANCE COMPANY,

Defendant.

----------X

INDEX NO. 153610/2017

MOTION DATE 09/29/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 32, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for JUDGMENT - DECLARATORY.

Defendant's motion for summary judgment is granted as described below.

Background

This declaratory judgment action arises out of a terrible tractor trailer accident in Chemung County, New York. Glen Guarino was transporting municipal waste in a tractor trailer on August 22, 2015 when he was in an accident with another car. Plaintiff alleges that it insured the tractor (with a single limit coverage of $1 million) while defendant insured the trailer portion (with liability coverage up to $5 million). Unfortunately, both passengers of the car passed away and their estates later commenced wrongful death lawsuits in Chemung County against the driver as well as the owner of the tractor ("Glensan") and the owner of the trailer ("Mr. Bult's").

Plaintiff also observes that a contractor ("Finger Lakes") later commenced a separate action relating to the environmental clean-up associated with the accident against both Glensan and Mr. Bult's, also in Chemung County.

This case involves whether or not plaintiff has to pay defense costs. The parties do not dispute that plaintiff provided primary coverage and defendant provided excess coverage. Plaintiff argues that it provided primary liability insurance coverage under its policy to Glensan. It claims it paid small sums to the New York State Department of Transportation and to the Village of Horseheads before tendering the balance of the policy limit ($987,310.80) to defendant in the two wrongful death cases and the environmental clean-up litigation. Plaintiff also asserted that because its insureds were permissive users of the trailer insured by defendant, the crossclaims asserted by Mr. Bult's (the trailer owner) in the underlying litigations should be discontinued as barred by the anti-subrogation rule.

Plaintiff asserts that defendant acknowledged the tender of the balance of remaining policy funds but rejected the defense of Glensan and Guarino as well as the request to discontinue the crossclaims. Plaintiff insists that because it has tendered the full amount of the balance of its policy limits to defendant, its duty to defend its insured has terminated and that defendant must now assume the defense of plaintiff's insureds.

In this motion, defendant moves for summary judgment and declaratory relief. It claims that it was not obligated to assume the defense of Mr. Bult's or plaintiff's insureds in the three underlying actions and also seeks to recoup defense costs associated with those actions. It points out that the wrongful death cases settled in 2022.

It asserts that this case turns on whether the tender of the remaining policy limits by plaintiff to defendant prior to settlement or a judgment of the underlying cases extinguished plaintiff's obligation to defend Guarino (the driver), Glensan, and Mr. Bult's. Defendant argues that plaintiff had to continue to defend the insureds until the end of these cases and that tendering the full amount of the policy is not an excuse for ceasing to defend.

In opposition, plaintiff claims that there are factual questions regarding whether defendant, through its conduct, accepted the defense of its insureds. It argues that an excess insurer (here, defendant) has the discretion to accept and participate in the defense of insureds. Plaintiff points out that defendant procured an attorney for Mr. Bult's and that defendant took the lead in the defense of the underlying actions. It observes that defendant's chosen attorneys hired experts, participated in court-ordered mediation and that defendant paid one half of these costs and fees.

Plaintiff maintains that there are issues of fact about whether defendant waived its right to recover defense costs and whether it is estopped from seeking recovery of these expenses. Plaintiff points to letters from defendant that allegedly show that Mr. Bult's would be provided an attorney by defendant and that plaintiff only had to indemnify and hold Mr. Bult's harmless. It argues that defendant did not mention it would be seeking legal fees and costs for the defense of Mr. Bult's until a month prior to the service of its answer in this case (about April 2017).

Plaintiff observes that this case remained dormant[1] for five years and defendant did not assert it would seek legal fees for the defense of Mr. Bult's and plaintiff simply relied upon this course of conduct.

In reply, defendant argues that it tendered to plaintiff in January 2016 and that this tender was rejected by plaintiff. It emphasizes that this denial continued until January 2017 when plaintiff finally agreed to cover defendant's insured on a primary basis. Defendant questions how plaintiff could assert that it relied upon a letter from defendant's third-party administrator (the one that sought coverage from plaintiff) at a time when it was actively refusing coverage.

[1] The Court observes that plaintiff did nothing to move this case; this action was not assigned to a judge until *defendant* filed an RJI in November 2022.

Defendant observes that it sought to recover defense costs in its answer in this case, filed in May 2017 and so plaintiff cannot assert surprise as a legitimate defense.

Defendant points out that plaintiff did not mention the anti-subrogation rule at all in its opposition and that defendant does not seek recovery against its own insured, so the Court should reject this argument (which was raised in the complaint). It adds that it has no opposition to plaintiff's request for a "hearing" to determine the reasonableness of the fees sought by defendant.

Discussion

The Court's analysis begins with the subject regulation, which provides that:

> "With respect to such insurance as is afforded, the insurer, subject to the policy terms shall: defend any suit, with the right to make such investigation, negotiation and settlement as it deems expedient; pay all premiums on attachment bonds and appeal bonds; pay all expenses incurred by the company, all costs taxed against the insured in any such suit, and all interest accruing after entry of judgment until the insurer has paid or tendered or deposited in court such part of such judgment as does not exceed the applicable policy limits; pay expenses incurred by the insured for first aid to others at the time of accident; and reimburse the insured for reasonable expenses other than loss of earnings, incurred at the company's request. The amounts so incurred under this subdivision, except settlement of claims and suits, shall be payable by the company in addition to the applicable policy limits" (11 NYCRR § 60-1.1[b]).

The Appellate Division, First Department, in citing this regulation, has observed that "that there is a New York State Insurance Department regulation that has been construed as requiring automobile insurers to pay all defense costs until a case ends. . . .automobile insurers are not excused from defense obligations by exhaustion of policy limits" (*In re E. 51st St. Crane Collapse Litig.*, 84 AD3d 512, 513, 923 NYS2d 64 [1st Dept 2011]). "Further, an automobile insurer . . . must pay all defense costs until a case ends, and is not excused from providing a full defense by tendering the policy amount (*Haight v Estate of DePamphilis*, 5 AD3d 547, 548, 772 NYS2d 833(Mem) [2d Dept 2004]).

The above-cited regulation and cases clearly show that plaintiff was not entitled to simply tender the full amount of the policy and then walk away from defense costs. A review of the correspondence between plaintiff and defendant (including with defendant's third-party administrator) does not create an issue of fact whereby the Court can ignore this clear caselaw.

Certainly, plaintiff is correct to point out that in the initial letter where defendant requested coverage from plaintiff in January 2016, defendant's third-party administrator stated that Mr. Bult's would be "providing their own defense" in response to one of the wrongful death cases (NYSCEF Doc. No. 19). The problem for this Court is that subsequent communications and events foreclose plaintiff's argument that it detrimentally relied on this January 2016 letter.

As defendant points out, the response to this January 2016 letter was a February 2016 letter from plaintiff in which it stated that it "will never provide defense or indemnity to Mr. Bult's Inc. and/or its subsidiaries" (NYSCEF Doc. No. 20). It strains credulity to assert that plaintiff detrimentally relied upon a letter that it promptly flat-out rejected. Plaintiff eventually agreed to provide insurance nearly a year later in a letter dated January 31, 2017 where it asserted "Country-Wide Insurance Company hereby tenders the balance of its entire policy limits in the amount of $987,310.80 and the defense of its insured(s) on the above-captioned litigations to, Mr. Bult's a/k/a MBI Trucking and its carrier(s)" (NYSCEF Doc. No. 22).

A few months later, in April 2017, plaintiff commenced this action for declaratory relief and defendant responded in May 2017 with counterclaims seeking a declaration that plaintiff has to defend the aforementioned insured and to recoup the defense costs already expended. In other words, even if plaintiff somehow relied upon the initial January 2016 letter about Mr. Bult's having its own defense, it knew just a few months after finally agreeing to provide coverage that

defendant believed plaintiff had to pay the defense costs. Nothing asserted on this record establishes a waiver or estoppel argument sufficient to defeat the motion.

The fact is that there is no dispute that plaintiff agreed to provide primary insurance coverage to defendant's insured (Mr. Bult's) and it was not permitted to simply send over the full amount of the policy and avoid paying defense costs. That plaintiff's policy purported to limit its duty to defend is of no moment as policy language that conflicts with 11 NYCRR § 60-1.1(b) is unenforceable.

That defendant "took the lead" in getting an attorney who subsequently hired experts and defended the case is not evidence of waiver. Defendant was not required to wait around, and possibly harm its insured (as well as possibly implicate more of its excess policy), while plaintiff refused to provide coverage. Plaintiff cannot blame defendant for making sure its client was adequately represented in wrongful death cases, cases that typically involve significant judgments or settlements.

The Court observes that defendant seeks reimbursement of $169,989.69 and plaintiff challenges the reasonableness of this amount. In reply, defendant did not oppose a hearing. Plaintiff is correct that there needs to be a determination as to the reasonableness of these fees. Given that defendant asserted "recoupment" of these fees as a counterclaim, the Court directs defendant to file a note of issue so that there can be a trial on this counterclaim. In other words, the Court is granting partial summary judgment on this counterclaim as to liability only, with the precise amount to be awarded at trial.

Accordingly, it is hereby

ORDERED that defendant's motion is granted to the extent that plaintiff's claims against it are severed and dismissed and it is entitled to summary judgment on its counterclaims as to liability only; and it is hereby

DECLARED that defendant Zurich American Insurance Company was not obligated to assume the defense of Country-Wide Insurance Company's ("Country-Wide") insureds in the lawsuits styled Steven Fossaceca, as Executor of the Estate of Louis M. Fossaceca, Jr. and Margaret Fossaceca, individually v. Glenn Guarino, Glensan Excavating, Inc. and Mr. Bult's, Inc. a/k/a MBI Trucking New York Supreme Court, Chemung County Index No. 2557/15; Patti Leach Painton, as Executrix of Estate of Randolph E. Painton and Patti Leach Painton individually v. Glenn Guarino, Glensan Excavating, Inc. and Mr. Bult's, Inc. a/k/a MBI Trucking New York Supreme Court, Chemung County Index No. 2016-1970; and Finger Lakes Enviro-Tech, LLC v. Glensan Excavating Inc. d/b/a/ Glensan Trucking, Mr. Bult's, Inc. New York Supreme Court, Chemung County Index No. 2016-1360; and it is further

ORDERED that the issue of the precise amount of reasonable defense fees to be recouped by defendant from plaintiff is severed and defendant shall file a note of issue for a trial on these damages on or before October 31, 2023.

10/3/2023
DATE

ARLENE P. BLUTH, J.S.C.

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