First Mercury Ins. Co. v Masonry Servs., Inc.

2015 NY Slip Op 30260(U)

February 23, 2015

Supreme Court, New York County

Docket Number: 158975/13

Judge: Anil C. Singh

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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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FIRST MERCURY INSURANCE COMPANY,

Plaintiff,

-against- Index No.: 158975/13

MASONRY SERVICES, INC., HARLEYSVILLE INSURANCE COMPANY OF NEW YORK, 775 LAFAYETTE AVENUE LLC, NYC PARTNERSHIP HOUSING DEVELOPMENT FUND COMPANY, INC., GREAT AMERICAN CONSTRUCTION CORP., TNS DEVELOPMENT GROUP LTD. AND DANIEL FRANCO,

Defendants.

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Anil C. Singh, J.

In this action, plaintiff First Mercury Insurance Company (First Mercury) seeks a declaration that it has no defense or indemnification obligations concerning a personal injury action in which Daniel Franco (Franco), a defendant in this action, is the plaintiff (the underlying action). First Mercury also seeks a declaration that it has no reimbursement, indemnification or contribution obligation to defendant Harleysville Insurance Company of New York (Harleysville) with respect to the underlying action.

Harleysville moves for an order granting summary judgment in its favor and a declaration that First Mercury must defend and indemnify Great American Construction Corp. (GA) on a primary basis in the underlying action and reimburse Harleysville for the defense costs that Harleysville has incurred defending GA in that action.[1] First Mercury opposes the motion.

[1] It is undisputed that Harleysville issued policy number GL2M9418 to Great American for the period of September 20, 2009 - September 20, 2010 and that the First Mercury policy at

Harleysville's named insured is GA, a contractor that provided services on the construction project at which Franco alleges he was injured. Defendant Masonry Services, Inc. (MSI) is a subcontractor that worked on the project pursuant to a written contract with GA that required MSI to obtain additional insured coverage for GA. Franco sued GA, MSI and others in the underlying action.

Franco's April 6, 2013 amended complaint in the underlying action alleges that on June 15, 2010, Franco, in the course of his employment with nonparty Valley Stream, Inc. (VS), was struck and/or crushed by a cement slab that slipped from a scaffold. Franco alleges that five defendants, including MSI and GA,

> "were careless, reckless, negligent and acted with gross negligence and wanton and malicious conduct and disregard for the well-being of plaintiff in failing to properly own, lease, operate, maintain, manage, supervise and control the [location of the incident] during construction; in being liable under Sections 200, 240, 240 (1) and 241 (6) of the Labor Law; in being liable under the doctrine of res ipsa loquitur; and in otherwise causing the damages sustained by Plaintiff"

(Cavallo moving affirmation, exhibit A,¶ 45).

MSI is the named insured on a commercial general liability (CGL) policy issued by First Mercury (the First Mercury Policy). The First Mercury Policy contains an additional insured endorsement, modifying the policy's CGL coverage, which states:

> "A. Section II – Who is An Insured is amended to include as an additional insured any . . . organization for [which] you are performing operations when you and such . . . organization have agreed in writing in a contract or agreement that such . . . organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for 'bodily injury' . . . caused in whole or in part, by;
>
> 1. Your acts or omissions; or

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issue here is number FMMA003083, effective October 11, 2009 - October 11, 2010.

2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured"

(Vilmany aff., exhibit B, Form CG 20 33 07 04). "You" and "your" in the First Mercury Policy refer to MSI. Harleysville asserts that GA is an additional insured under this provision. The First Mercury Policy contains another endorsement that states:

> "[t]his insurance does not apply to any claim, demand or suit arising out of operations performed for you by independent contractors unless such independent contractors have in force at the time of such occurrence [CGL] insurance, listing you as an additional insured on said [CGL] policy, and the limits of liability for such insurance are equal to or greater than those shown in the schedule below"

(Vilmany affirmation, exhibit B [the IC Exclusion]).

Franco's former employer, nonparty VS, is the named insured on a policy issued by nonparty Colony Insurance Co. (Colony).[2] The Colony policy (the Colony Policy) contains an additional insured endorsement which states:

> "ADDITIONAL INSURED - OWNERS, LESSEES OR CONTRACTORS - INCLUDING LIMITED COMPLETED OPERATIONS - BLANKET
>
> This endorsement modifies Insurance provided under the following:
>
> COMMERCIAL GENERAL LIABILITY COVERAGE PART
>
> SCHEDULE
>
> Name of Person or Organization:
>
> Any person or organization that is an owner of real property or personal property on which you are performing operations or a contractor on whose behalf you are performing operations and only where required by written contract or agreement that is an 'insured contract,' provided the 'bodily injury' or 'property damage' occurs subsequent to the

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[2] The Colony Policy, number AR3360464, for the period January 18, 2010 to January 18, 2011, the Harleysville policy and the First Mercury Policy all provide liability coverage with limits of $1 million per occurrence and $2 million in the aggregate.

execution of the contract or agreement

"A. SECTION II--WHO IS AN INSURED is amended to include as an insured the person or organization in the Schedule, but only with respect to liability caused by your ongoing and completed operations performed for that insured"

(Brouk affirmation, exhibit 8 [form U419-0806] [the AI Endorsement]). The Colony Policy also contains another endorsement, entitled "Exclusion–Specified Entities" (the Specified Entity Exclusion) which states:

"EXCLUSION - SPECIFIED ENTITIES

This endorsement modifies Insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name of Person or Organization

MASONRY SERVICES, INC.

SECTION II - WHO IS AN INSURED does not include the entities listed in the above schedule"

(Vilmany affirmation, exhibit D).

Initially, Harleysville assigned defense counsel for GA in the underlying action. By letter dated June 21, 2013, Harleysville demanded that First Mercury defend and indemnify GA in the underlying action as an additional insured on the First Mercury Policy. Harleysville states that the demand was also based on the GA-MSI contract, which required MSI to obtain additional insured coverage for GA on a primary, non-contributory basis. On June 25, 2013, by letter, GA's counsel tendered defense to First Mercury.

On July 9, 2013, First Mercury's claims specialist obtained a copy of a Colony Policy

issued to VS, for the relevant time period, and noted that it contained the Specified Entity Exclusion and the AI Endorsement. Six days later, First Mercury advised GA's counsel and Harleysville that First Mercury was investigating whether the IC Exclusion in the First Mercury Policy barred coverage. That same day, First Mercury demanded that Colony and VS defend and indemnify GA and MSI. First Mercury also commenced an investigation to determine if VS had a written agreement with MSI. By letter dated August 6, 2013, First Mercury agreed to defend GA, on a primary basis, but under a reservation of rights based on the IC Exclusion.

On September 26, 2013, by letter, First Mercury disclaimed coverage to GA based on the IC Exclusion. First Mercury stated that Franco alleged "that he was injured in the course of his employment with [VS], which was an independent contractor retained by [MSI] to perform construction work at the Premises" (Vilmany affidavit, exhibit M). First Mercury continued that:

> "[s]ince . . . Franco was employed by [VS] at the time of the alleged accident, the Franco Action arose out of [VS]'s operations. In the absence of a written contract or written agreement between [MSI] and [VS], requiring [VS] to procure insurance for the benefit of [MSI], [MSI] does not qualify as an additional insured under the [CGL] policy that Colony issued to [VS]. Given [MSI]'s unwillingness or inability to date to provide [First Mercury] with such a written contract or written agreement with [VS], we can only conclude that [MSI] has violated the requirements of the [IC Exclusion]. Since [VS] did not procure [CGL] insurance in the amount of $1,000,000 listing [MSI] as an additional insured, the [IC Exclusion] bars coverage for all insureds, additional insured . . . under the [First Mercury P]olicy for the Franco Action. . . [First Mercury] disclaims any obligation to defendant or indemnify . . . [GA] against the claims asserted . . . in the Franco Action"

(*id.*).[3] First Mercury stated that it would reexamine its coverage position if MSI had a written agreement relating to the work performed by Franco that required VS to procure $1 million of additional insured coverage for MSI.

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[3] First Mercury based its determination on its "understanding that [VS] . . . was an independent contractor retained by [MSI] to perform work at the construction site" (Vilmany affirmation, exhibit M).

Discussion

The moving party bears the burden of making "a prima facie showing of entitlement to judgment as a matter of law," by submission of sufficient admissible evidence to demonstrate the absence of any genuine issues of fact for trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Once this showing has been made . . . the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material" fact issues for trial (*id.* at 324). "Mere conclusory assertions, devoid of evidentiary facts, are insufficient [to defeat a well-supported summary judgment motion], as is reliance upon surmise, conjecture, or speculation" (*Grullon v City of New York*, 297 AD2d 261, 263-264 [1st Dept 2002] [citation and internal quotation marks omitted; alteration in original]).

Harleysville argues that judgment should be granted in its favor because, pursuant to Insurance Law § 3420 (d) (2), First Mercury is estopped from denying coverage to GA under the First Mercury Policy because First Mercury failed to disclaim coverage to GA until 95 days after it received Harleysville's June 2013 tender on behalf of GA, and 80 days after First Mercury received the Colony Policy on July 9, 2013.

In support, Harleysville points to First Mercury's claims specialist's notation that he had received VS's policy from another claim involving MSI and Valley, that covered the loss date, and that the policy excluded coverage for MSI. Harleysville asserts that First Mercury knew that Franco was injured while performing operations for VS, an independent contractor of MSI, and upon receipt of the Colony Policy, with its Specified Entities Exclusion, it was apparent that MSI did not qualify as an insured on the Colony Policy. Harleysville contends that it then should have

been readily apparent to First Mercury that the IC Exclusion might apply to bar coverage to GA for the underlying action, but that First Mercury did not disclaim until September 26, 2010.

In opposition, First Mercury argues that whether the IC Exclusion barred coverage was not readily apparent, because the Colony Policy's Specified Entities Exclusion and AI Endorsement provisions conflict. First Mercury argues that MSI might have qualified as an additional insured on the Colony Policy, as that policy provided additional insured coverage where required by written contract, and the IC Exclusion bars coverage only if MSI had not been added as an additional insured on the Colony Policy. First Mercury contends that whether or not MSI qualified as an additional insured on the Colony Policy depended on the existence of an insurance procurement agreement between MSI and VS, and that Colony never asserted the Specified Entities Exclusion, and acknowledged the conflict. First Mercury states that it conducted a prompt and diligent investigation, but was hindered by MSI's delay in providing information, including a VS contract with MSI, which MSI claimed existed and for which MSI claimed that it was searching. First Mercury asserts that MSI eventually ceased communicating with First Mercury and its hired investigator and did not provide a contract, so that, by September 26, 2013, it became evident that there was none. First Mercury notes that Harleysville does not argue that the IC Exclusion does not apply, and that whether any delay was unreasonable constitutes a triable fact issue. First Mercury provides the affidavits of its employee and an investigator that demonstrate their attempts to obtain a copy of a VS/MSI contract from MSI, or a statement from MSI that none existed. The evidence also shows that MSI may have indicated that such a contract existed and that it was searching for it.

In reply, Harleysville reiterates its argument that, on July 9, 2013, First Mercury should have known that the IC Exclusion barred coverage because MSI was not listed as an additional insured on the Colony Policy, but expressly excluded as such. Harleysville contends that the Colony Policy is not ambiguous, that First Mercury's assertion that Colony acknowledged ambiguity is hearsay, and that whether Colony actually afforded or denied coverage is irrelevant.

In insurance coverage cases, a court first looks to the language of the policy, which should be construed "in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect" (*see Raymond Corp. v National Union Fire Ins. Co.* Of Pittsburgh, Pa., 5 NY3d 157, 162 [2005] [internal quotation marks and citation omitted]; *County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628 [1994] ["An insurance contract should not be read so that some provisions are rendered meaningless"]). "[U]nambiguous provisions of an insurance contract must be given their plain and ordinary meaning," and ambiguous provisions "construed in favor of the insured and against the insurer" (*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]).

First Mercury's position rests on the contention that whether the IC Exclusion applied was not readily apparent on July 9, 2013 because the Colony Policy is ambiguous as to whether or not MSI was an additional insured, as the AI Endorsement and the Specified Entities Exclusion conflict. First Mercury relies on *LaBoutique NY, Inc. v Utica Ins. Co.* (18 Misc 3d 1132 [A], 2008 NY Slip Op 50266 [U] [Sup Ct, Richmond County 2008]), in which the defendant insurers sought to disclaim coverage afforded under a blanket additional insured endorsement based on a contractual liability exclusion. The court determined that these provisions, read together, created

an ambiguity as to the existence of coverage, necessarily resolved in the insured's favor (18 Misc 3d 1132 [A], 2008 NY Slip Op 50266 [U], *4).

Unlike *LaBoutique NY, Inc.*, the Specified Entities Exclusion does not render ineffective the AI Endorsement. The Colony AI Endorsement is a blanket endorsement, that applies to any person or organization, and is intended to add as additional insureds a category of entities. The Specified Entities Exclusion acts to exclude one specific entity, MSI, from coverage and informs that MSI is not among those which might otherwise qualify as an insured under the policy (*see DRK, LLC v Burlington Ins. Co.*, 74 AD3d 693, 695 [1st Dept 2010] [specific provision controlled over general one where conflicting]). Interpreting the Colony Policy as ambiguous as to whether or not MSI was excluded "would run afoul of the cardinal rule of construction that a court adopt an interpretation that renders no portion of the contract meaningless'" (*Empire Ins. Co. v Miguel*, 114 AD3d 539, 540 [1st Dept 2014] [internal quotation marks and citation omitted]). Furthermore, where an agreement is clear and unambiguous, "the courts should not strain to superimpose an unnatural or unreasonable construction" (*Maurice Goldman & Sons v Hanover Ins. Co.*, 80 NY2d 986, 987 [1992], or "construe a clause in a way that drains it of its only intended meaning" (*Commissioners of State Ins. Fund v Insurance Co. of N. Am.*, 80 NY2d 992, 994 [1992]). The parties do not argue that the Specified Entities Exclusion is ambiguous. Where MSI is specifically named, or listed, as not being included among the Colony Policy's insureds, it would be with great strain that the Colony Policy could be interpreted as informing a reasonable business person something other than that MSI is not an insured thereunder.

It is well known that Insurance Law § 3420 (d) (2) requires that an insurer's decision to

disclaim liability insurance coverage must be given to the insured, in writing, as soon as is reasonably practicable, "failing which the disclaimer or denial will be ineffective" (*Mohawk Minden Ins. Co. v Ferry*, 251 AD2d 846, 847 [3d Dept 1998]). Reasonableness of a delay is measured from the time when the insurer "has sufficient knowledge of facts entitling it to disclaim, or knows that it will disclaim coverage" (*First Fin. Ins. Co. v Jetco Contr. Corp.*, 1 NY3d 64, 66 [2003]). "[W]here the basis for disclaimer is not readily apparent, the insurer has a duty to promptly and diligently investigate the claim" (*GPH Partners, LLC v American Home Assur. Co.*, 87 AD3d 843, 844 [1st Dept 2011]). The burden rests on the insurance company to explain delays in providing the written notice of disclaimer and, generally, the timeliness of a notice of disclaimer raises a fact for trial, but such matters also may be decided as a matter of law where facts are established (*see e.g. First Fin. Ins. Co.*, 1 NY3d at 69-70 [48 days untimely as a matter of law]; *Tower Ins. Co. of N.Y. v NHT Owners LLC*, 90 AD3d 532, 533 [1st Dept 2011]).

First Mercury submits the affidavit of its claims specialist, who avers that on July 9, 2013 he did not know if the copy of the Colony Policy that he had was the correct policy or if there were other policies. However, the claims specialist's contemporaneous notation discusses the Colony policy that he had, and specifically indicates that the only issue that remained was whether the AI Endorsement conflicted with the Specified Entities Exclusion. The claims specialist noted that he would tender to Colony and continue to make efforts to secure the VS contract with MSI, but mentions nothing about obtaining information concerning whether there was a different Colony policy, or another insurance policy, for the same time period. The claims specialist does not explain why he might have believed that the Colony Policy was inapplicable, when his

notation indicates otherwise, and First Mercury does not indicate that it made any attempt thereafter to determine if there was another applicable policy.[4] Summary judgment may not be defeated by these conclusory and unsupported assertions (*Grullon,* 297 AD2d at 263-264).

Therefore, First Mercury's contention that it was required to investigate the existence of a contract between VS and MSI is unpersuasive. First Mercury's August 2013 reservation of rights letter was not sufficient to serve as a valid disclaimer (*see Hartford Ins. Co. v County of Nassau*, 46 NY2d 1028, 1029 [1979]; *Strauss Painting, Inc. v Mt. Hawley Ins. Co.*, 105 AD3d 512, 513 [1st Dept 2013], *affd as mod* --- NY3d ----, 2014 NY Slip Op 08214 [Nov 24, 2014]). The record demonstrates that, on July 9, 2013, First Mercury had the Colony Policy, which made readily apparent that MSI was not an insured thereon but did not disclaim to GA until September 26, 2013, 80 days later. This disclaimer was untimely.

The duty to defend arises "whenever the allegations within the four corners of the underlying complaint potentially give rise to a covered claim" (*Frontier Insulation Contrs. v Merchants Mut. Ins. Co.*, 91 NY2d 169, 175 [1997]). Franco sued GA alleging that he was injured while working for VS. There is no dispute that VS was MSI's subcontractor, and that the First Mercury Policy provides additional insured coverage for liability for bodily injury caused in whole or in part by the acts or omissions of MSI or those acting on MSI's behalf. Franco's complaint allegations sufficiently triggered the duty to defend under the First Mercury policy. Therefore, GA, and Harleysville, are entitled to a declaration that GA is entitled to a defense in

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[4] The claims specialist states that he spoke with a Colony claims handler on August 26, 2013, but does not indicate that he attempted to determine whether the Colony policy that he had on July 9, 2009 was the correct one. In addition, the language of the IC Exclusion does not rest upon the determination by another insurer as to whether or not coverage exists.

the underlying action provided by First Mercury.[5]

Harleysville argues that GA is entitled to indemnification on a primary basis. In opposition, First Mercury argues that a determination concerning whether it has a duty to indemnify is premature, as no liability determination has been made in the underlying action, and no determination has been made that the injury was caused in whole or party by the acts or omissions of MSI or VS. In reply, Harleysville points to the First Mercury Policy's additional insured provision, and asserts that Franco seeks to impose liability upon GA for bodily injuries caused in whole or part by MSI's acts or omissions. Harleysville contends that these allegations sufficiently trigger First Mercury's obligations to defend and indemnify GA in the Underlying Action on a primary basis.

As a preliminary matter, First Mercury does not dispute Harleysville's contention that, based on the "other insurance" provisions in the First Mercury Policy and Harleysville policy and the primary/non-contributory endorsement in the First Mercury Policy, the First Mercury Policy provides primary coverage over the Harleysville policy. In fact, for the period of time during which First Mercury agreed to defend GA under reservations of rights, it agreed to do so on a primary basis.

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[5] With Harleysville's reply, GA's counsel submits an affidavit in further support, in which she asserts that Harleysville's motion should be granted based on the reasons set forth in the Harleysville moving affidavits. While Harleysville's counsel, in reply, states that GA moved for summary judgment with Harleysville, there is no indication of this in the moving papers. However, in its answer GA asserts that First Mercury has an obligation to defend and indemnify GA as an insured in the underlying action, which demonstrates that GA also seeks the declaration sought by Harleysville and both parties are entitled to a declaration that First Mercury must defend GA as an additional insured.

However, "[t]he duty to indemnify requires a determination of liability" (*Greenwich Ins. Co. v City of New York*, 122 AD3d 470, 471 [1st Dept 2014] [internal quotation marks and citation omitted]; *Bovis Lend Lease LMB Inc. v Garito Contr., Inc.*, 65 AD3d 872, 875 [1st Dept 2009] [indemnification claim premature "[i]n the absence of a jury finding in the underlying action"]; *Atlantic Mut. Ins. Co. v Terk Tech. Corp.*, 309 AD2d 22, 28 [1st Dept 2003] [the duty to indemnify turns on established facts not pleadings]). *Strauss* (105 AD3d 512), to which Harleysville cites in reply, does not state otherwise. Strauss involved an additional insured endorsement similar to that in the First Mercury Policy. The Appellate Division deleted the portion of the trial court's declaration that conditioned the insurer's duty to defend and indemnify an owner/lessee, as an additional insured, upon a finding of negligence by an additional insured. Instead, the Court declared that indemnification was conditioned "upon a finding of an act or omission by plaintiff or one acting on plaintiff's behalf," providing conditional indemnification, dependent upon fact findings in the underlying case. In *National Union Fire Ins. Co. of Pittsburgh, PA v Greenwich Ins. Co.* (103 AD3d 473, 474 [1st Dept 2013]), also cited by Harleysville, in reply, the Court, in issuing an order of indemnification, specifically stated that: the

> "[d]efense counsel admitted below that the underlying personal injury action arose out of an accident that occurred while Draper was acting on behalf of Associated in the performance of its ongoing operations. Thus, the condition set forth in the additional insured endorsement was satisfied, and summary judgment should have been granted in plaintiff's favor."[6]

Here, Harleysville did not seek conditional indemnification and relied only on Franco's pleadings from the underlying case, which do not distinguish among the defendants.

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[6] Other cases cited to by Harleysville are not binding precedent and this court does not have the records that were before those courts.

In any event, Harleysville, in moving, did not make arguments to support its contentions that it was entitled to an indemnification declaration, reserving its arguments for reply. As the First Department stated in *Dannasch v Bifulco* (184 AD2d 415, 417 [1st Dept 1992]): "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" (*see also Mulligan v City of New York*, 120 AD3d 1155, 1156 [1st Dept 2014]). Ultimately, Harleysville and GA may be entitled to indemnification from First Mercury, but a ruling now, based on pleadings and reply arguments, is inappropriate. However, this determination is without prejudice to renewal when a more developed record is available from the underlying proceedings.

In moving, Harleysville argues that it is entitled to the defense costs that it has incurred in the underlying action as its policy is excess over First Mercury's policy. In opposition, First Mercury argues that only GA, the insured, and not Harleysville, an insurer, can benefit from Insurance Law 3420 (d) (2), and that Harleysville is not entitled to reimbursement of past defense fees and costs, or to the payment of future fees and costs, for any of Harleysvilles other insureds.[7] First Mercury notes that Harleysville did not raise the IC Exclusion in moving and did not demonstrate that the expenses/fees were reasonable. First Mercury contends that they are not.

In reply, Harleysville argues that the IC Exclusion does not apply and that, as an excess insurer, it is entitled to reimbursement from First Mercury of its defense costs incurred on behalf

[7] First Mercury argues that Insurance Law § 3420 (d) (2) also does not inure to the benefit of any of the putative additional insureds, other than GA, because none of them satisfies the privity requirement for coverage under the First Mercury policy's additional insured endorsement, but no other party has moved, including First Mercury.

of GA in the underlying action from the date of its tender to First Mercury on June 21, 2013. As First Mercury pointed out, Harleysville is not entitled to the protection of Insurance Law § 3420 (d) (2) (*see Greater N.Y. Mut. Ins. Co. v Chubb Indem. Ins. Co.*, 105 AD3d 523, 525 [1st Dept 2013] [first insurer was required to give timely notice of disclaimer of substantive exclusions to insured, but not to second insurer that requested defense and indemnity, and second insurer was not entitled to reimbursement of defense costs expended]; *American Guar. & Liab. Ins. Co. v State Natl. Ins. Co., Inc.*, 67 AD3d 488 [1st Dept 2009]). In moving, Harleysville did not address the IC Exclusion, and its other reply arguments for fees, for example, based on subrogation, were not raised in moving. Consequently, Harleysville did not meet its burden of demonstrating entitlement to relief on the motion, and may not do so in reply. As First Mercury has not moved, neither party has demonstrated entitlement to summary judgment on this issue, and this portion of the motion is denied, without prejudice, rendering it unnecessary to reach First Mercury's contention that the fees/costs are not reasonable.

Conclusion

Based on the foregoing, it is

ORDERED that the motion of Harleysville Insurance Company of New York is granted, in part, to the extent that it seeks a declaration that First Mercury Insurance Company is required to defend Great American Construction Corp. in the underlying action, and otherwise denied without prejudice to renewal, in accordance with the decision and order above; and it is further

DECLARED that First Mercury Insurance Company, under policy number FMMA003083, is required to defend Great American Construction Corp. in the action captioned

Franco v 775 Layfayette Avenue LLC, et al. (Supreme Court, Queens County, index No. 702248/12).

Dated: 2/23/15

ENTER:

J.S.C.

HON. ANIL C. SINGH
SUPREME COURT JUSTICE