[* 1] SCANNED ON 7/27/2004

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

PRESENT: EMILY JANE GOODMAN PART 17
Justice

WAUSAU BUSINESS INS. Co

INDEX NO. 600236-03

MOTION DATE

- v -

MOTION SEQ. NO. 002

SANITATION SALVAGE CORP

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits | |
| Replying Affidavits | |

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross motion is decided in accordance with the attached decision and order, dated 7/7/04

FILED
JUL 27 2004
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 7/7/04

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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WAUSAU BUSINESS INSURANCE COMPANY,

Plaintiff,

Index No. 600256/03

-against-

SANITATION SALVAGE CORP. and
DANIEL J. VALERIO,

Defendants.

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SANITATION SALVAGE CORP. and DANIEL J. VALERIO,

Third-Party Plaintiffs,

-against-

FAIRMONT INSURANCE BROKERS, LTD.,

Third-Party Defendant.

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**Emily Jane Goodman, J.S.C.:**

This action was commenced by plaintiff Wausau Business Insurance Company (Wausau) for a judicial declaration that it is not obligated to defend defendants Sanitation Salvage Corp. (Sanitation) and Daniel J. Valerio (Valerio)(together, defendants) in an action entitled *Hyacinth Gardener, as Administratrix of the Estate of Clameth Gardener, deceased and Hyacinth Gardener v Sanitation Salvage Corp. and Daniel J. Valerio*, Index No. 24774/01 (the underlying action), which is

presently pending in the Supreme Court, Bronx County. Wausau moves for summary judgment in this action.[1] Defendants cross-move for summary judgment.

It is undisputed that Wausau issued a Business Auto policy of insurance (the policy) to non-party J&R Trucking, Inc. (J&R), for the period August 4, 2000 to August 4, 2001, with an extension to September 14, 2001. The policy listed only J&R as named insured, and applied, in brief, to certain persons using a covered vehicle owned, hired, or borrowed from J&R, with J&R's permission.

In the underlying action, it is claimed that plaintiff therein suffered injuries on December 2, 2000, leading to his death, when he allegedly was struck by a vehicle belonging to Sanitation, and driven by Sanitation's employee, Valerio. The crux of the present action is Wausau's claim that defendants are not named insureds under the policy, and are not entitled to be defended and indemnified by Wausau with regard to the underlying accident, even though Wausau has already assumed the defense of the action.

According to Wasau's own internal emails, it began investigating the accident in January, 2001, one month after the accident. Notice of Motion, Ex N. It is undisputed that

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[1]Wausau denominates the motion as one for partial summary judgment, although granting of the motion will end the action.

Sanitation immediately notified Wausau of the accident, and immediately notified Wausau of the commencement of the underlying action some 10 months later, on October 26, 2001. On October 29, 2001, Wausau appointed counsel in that action and continued in that role for eight months, before sending defendants a disclaimer letter, dated June 26, 2002, stating that defendants were not, in fact, named insureds under the policy. The underlying action was stayed on June 2, 2003, pending a determination on the issue of Wausau's duty to defend and indemnify defendants.

As previously noted, the present action was commenced against defendants for a declaration. Defendants then commenced a third-party action against the party who allegedly procured the coverage for defendants, third-party defendant Fairmont Insurance Brokers, Ltd., who allegedly issued an insurance card to Sanitation indicating that a policy was issued by Wausau, with an expiration date of August 4, 2001. Fairmont Insurance Brokers, Ltd. opposes Wausau's motion and maintains that it sent a facsimile, before the accident, to Go Pro Underwriting Managers, Inc. (administrators for Wausau) requesting that Go Pro Underwriting Managers, Inc. add "as additional named insured: Sanitation Salvage Corp.," and confirmed that request orally. Fairmont Insurance Brokers, Ltd., however, has not moved for any specific relief.

It is not necessary to discuss whether or not defendants are covered under the policy because resolution of the motions, and this action, turns on Wausau's disclaimer notice and the application of equitable estoppel in this case.[2]

Insurance Law § 3420(d) states that:

> [i]f under a liability policy delivered or issued for delivery 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.

Pursuant to this section, defendants claim that Wausau's delay in disclaiming coverage until a year and a half after notice of the accident, and eight months after Wausau assumed the defense of the action, is unreasonable, as a matter of law. As Wausau correctly points out, however, Insurance Law § 3420(d) does not apply when the claim falls outside the policy's coverage provisions. *Matter of Worcester Ins. Co. v Bettenhauser*, 95 NY2d 185, 188 (2000)("[d]isclaimer pursuant to section 3420[d] is unnecessary when a claim falls outside the scope of the policy's

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[2]The Wausau policy declarations page indicates that J & R is the named insured. The policy originally contained a schedule of covered vehicles, and included the vehicle involved in the accident. Subsequent to the accident, Wausau issued an endorsement removing the vehicle involved in the accident as one of the covered vehicles. Wausau maintains that it issued the endorsement after discovering that J & R was not the owner of the vehicle involved in the accident and refunded that portion of the premiums attributable to the vehicle to J & R.

coverage portion"); *see also Zappone v Home Ins. Co.*, 55 NY2d 131, 137 (1982)(section 3420[d] not intended "to provide an added source of indemnification which had never been contracted for and for which no premium had ever been paid"). Thus, Wausau correctly notes that, in this case, disclaimer is not sought under an exclusion under the policy, but because of a total lack of coverage, in that Sanitation was never made a named insured on the policy.

Despite Wausau's arguments, an insurer may be estopped from denying coverage, even on the grounds that the putative insured is not an insured under the policy, where the delay in disclaiming causes the insured prejudice. *See Hartford Acc. & Indem. Co. v Carson C. Peck Mem. Hosp.*, 162 AD2d 659, 661 (2d Dept 1990)("'[a]n estoppel will lie only if the insured has been prejudiced by the insurer's actions' [citation omitted]"). Defendants maintain that estoppel should be applied here because they have been prejudiced as a result of Wausau's delay in disclaiming coverage, after having been aware of the incident for one and a half years, and defending the action for eight months. On the other hand, Wausau contends that defendants suffered no prejudice because discovery in the underlying action was in its early stages when the action was stayed. Moreover, Wausau argues that there is no evidence that the memory of the eyewitnesses (who have not yet been deposed) have faded, or, that the

witnesses will be unavailable for trial.

> Distinguished from waiver, of course, is the intervention of principles of equitable estoppel, in an appropriate case, such as where an insurer, though in fact not obligated to provide coverage, without asserting policy defenses or reserving the privilege to do so, undertakes the defense of the case, in reliance on which the insured suffers the detriment of losing the right to control its own defense. In such circumstances, though coverage as such does not exist, the insurer will not be heard to say so (*see O'Dowd v American Sur. Co. of N.Y.*, 3 NY2d 347 [1957]; *Gerka v Fidelity & Cas. Co.*, 251 NY 51 [1929]).

*Albert J. Schiff Assocs., Inc. v Flack*, 51 NY2d 692, 699 (1980). *See also American Tr. Ins. Co. v Mendon Leasing Corp.*, 241 AD2d 436 (1st Dept 1997).

Where an insurer takes control of the insured's defense and fails to take a reservation of rights,[3] while having knowledge of facts which justify a disclaimer, courts are divided over whether a plaintiff must establish prejudice to invoke estoppel against an insurer. Some cases presume prejudice. *See AB Recur Finans v Nordstern Ins. Co. Of North Am.*, 130 F Supp 2d 596 (SDNY 2001) (prejudice was presumed where insurer defended action through trial and entry of judgment); *Brooklyn Hosp. Ctr. v Centennial Ins. Co.*, 258 AD2d 491 (2d Dept 1999)(prejudice was presumed

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[3]The import of *Albert J. Schiff Assocs., Inc. v Flack, supra*, is that the taking of a reservation of rights by the insurer alerts the insured to the fact that he may, at some later date, have to take over the defense of his action; hence, there is no prejudice where a reservation of rights has been made. *See e.g. McKay v Healthcare Underwriters Mut. Ins. Co.*, 295 AD2d 686 (3d Dept 2002); *General Acc. Ins. Co. v 35 Jackson Ave. Corp.*, 258 AD2d 616 (2d Dept 1999).

where insurer defended action for 11 years before disclaiming coverage); *Reliance Ins. Co. v Daly*, 67 Misc 2d 23 (Sup Ct, Nassau County), *mod* 38 AD2d 715 (2d Dept 1972) (prejudice was presumed where insurer defended action for more than one year after acquiring knowledge of grounds for disclaiming coverage). Other cases require that prejudice be demonstrated. *See Hartford Acc. & Indem. Co. v Carson C. Peck Mem. Hosp.*, 162 AD2d 659, *supra* (insured did not establish prejudice where insurer disclaimed coverage before the case was put on the trial calender); *Touchette Corp. v Merchants Mut. Ins. Co.*, 76 AD2d 7 (4th Dept 1980)(same); *Kearns Coal Corp. v United States Fidelity & Guaranty Co.*, 118 F 2d 33 (2d Cir 1941)(prejudice to the insured must be shown).

The First Department appears to have answered this question to require a showing of prejudice. *See General Acc. Ins. Co. v Metropolitan Steel Indus. Inc.*, 2004 NY App Div LEXIS 9263 (1st Dept, July 1, 2004). In agreeing that the application of estoppel was proper, the First Department held that the "defendant sufficiently demonstrates that plaintiffs imposed a posture and strategy on the underlying action that it cannot now alter, and that its ability to control the defense of the underlying action was otherwise prejudiced by plaintiff's delay in disclaiming until that action was well underway." *Id.* at 2. The trial court (Lehner, J.) noted that the insurer began

investigating the accident in June 2001, designated counsel in November 2001 (without asserting a reservation of rights), undertook discovery, and conducted settlement negotiations before disclaiming coverage eight months after the litigation commenced. *See General Accid. Ins. Co. v Metropolitan Steel Indus. Inc.* (Sup Ct, New York County, Aug. 18, 2003, Lehner, J. Index No. 604588/02).

Similarly here, defendants have demonstrated prejudice sufficient to invoke estoppel against the insurer. Although the Court is cognizant that in the majority of cases applying estoppel against an insurer, the insurer controlled the litigation for longer than eight months, the present case is sufficiently analogous to *General Acc. Ins. Co. v Metropolitan Steel Indus. Inc.*, 2004 NY App Div LEXIS 9263, *supra*, to support the application of estoppel here.[4] As in *General Accid. Ins. Co. v Metropolitan Steel Indus. Inc., supra.*, Wausau undertook to defend and indemnify defendants when the action was commenced, and, defended the action for eight months thereafter. As previously noted, Wausau appointed counsel for Sanitation on October 29, 2001 and filed an Answer, dated November 9, 2001.

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[4]In *General Acc. Ins. Co. v Metropolitan Steel Indus. Inc., supra*, the First Department noted that "the insured was covered by the policy at the time of the loss . . . albeit perhaps not for the type of loss claimed." Although this Court has not determined that defendants were covered by the Wausau policy, it appears that the First Department's statement, regarding coverage, was dicta.

Further, according to court records, Wausau attended a preliminary conference on March 7, 2002 before issuing its disclaimer notice on June 26, 2002. Wausau also investigated the accident as early as January, 2001, a period four months longer than the investigation period in *General Accid. Ins. Co. v Metropolitan Steel Indus. Inc., supra*. Moreover, there is no evidence, or even suggestion, that Wausau reserved its rights to disclaim at any time. As a result, plaintiff "imposed a posture and strategy" that cannot now be altered. *General Accid. Ins. Co. v Metropolitan Steel Indus. Inc., supra*.

Further, Wausau had notice of the facts behind its disclaimer immediately upon receiving the initial notice of the incident. The basis for its disclaimer is apparent from the face of the policy: defendants' names do not appear as additional named insureds. *See Indemnity Ins. Co. of North Am. v Charter Oak Ins. Co.*, 235 AD2d 521, 522 (2d Dept 1997) (complaint "clearly indicated that the accident in question occurred outside [the insurer's] coverage period," so that insurer could have detected the grounds for disclaimer upon receipt of the complaint); *see also Am. Tr. Ins. Co. v Mendon Leasing Corp.*, 241 AD2d at 437 (insurer estopped from disclaiming coverage after it had represented the insured for three years in settlement negotiations and one year in litigation; "the insurer had in its possession all the information necessary to make a determination

as to whether the subject vehicle was listed under the policy" before undertaking such representation); *Boston Old Colony Ins. Co. v Lumbermens Mut. Cas. Co.*, 889 F2d 1245, 1248 (2d Cir 1989) (insured estopped from disclaiming coverage on the verge of trial; insurer's "failure to adequately investigate its own records undermines its position"). Accordingly, Wausau's failure to investigate timely its own records undermines its position here.

In light of the above, Wausau is estopped from disclaiming coverage, regardless of whether the policy does, in fact, provide coverage.

Accordingly, it is

ORDERED that Wausau's motion for partial summary judgment is denied; and it is further

ORDERED that defendants Sanitation Salvage Corp. and Daniel J. Valerio's cross motion for summary judgment is granted; and it is further

ADJUDGED and DECLARED that Wausau is obligated to defend and indemnify defendants Sanitation Salvage Corp. and Daniel J. Valerio in the underlying action entitled *Hyacinth Gardener, as Administratrix of the Estate of Clameth Gardener, deceased and Hyacinth Gardener v Sanitation Salvage Corp. and Daniel J. Valerio*, Index No. 24774/01, pending in the Supreme Court, Bronx County; and it is further

ORDERED that the third-party action is severed, and shall continue, with leave for third-party defendant Fairmont Insurance Brokers, Ltd. to move for whatever relief it deems appropriate.

Dated: July 7, 2004

ENTER: