

02/18/2005 15:36

NO. 379 0002

**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL-TERM PART 15**

Present: Honorable Mary Ann Brigantti-Hughes

FILED

AMERICAN HOME ASSURANCE COMPANY,

FEB 14 2005

Plaintiff,

-against-

~~CLERK'S~~ CLERK'S OFFICE

IVORY HOLDING CO., INC., 121 EAST CLARKE
PLACE CORP., THE CITY OF NEW YORK,
GRACIELA VALERIO, an infant, by her
mother and natural guardian, ROSA
FERNANDEZ and ROSA FERNANDEZ,
individually,

DECISION/ORDER

Index No.: 24476/97

Defendants.

IVORY HOLDING CORP.,

Third Party Plaintiffs,

-against-

IGM BROKERAGE CORP., INSURANCE ASSOCIATION,
L.P., PROGRAM BROKERAGE CORP., OLD LYME
INSURANCE COMPANY OF RHODE ISLAND,
AMERICAN INTERNATIONAL SPECIALTY LINES
INSURANCE COMPANY, ROYAL INDEMNITY
COMPANY, RELIANCE INSURANCE COMPANY,
INSURANCE COMPANY OF THE STATE OF
PENNSYLVANIA, TRAVELERS INSURANCE
COMPANY, WESTCHESTER FIRE INSURANCE
COMPANY, CHUBB CUSTOM INSURANCE
COMPANY, NUTMEG INSURANCE COMPANY,
RLI INSURANCE COMPANY, AETNA CASUALTY
& SURETY COMPANY, U.S. FIRE INSURANCE
COMPANY, HARTFORD CASUALTY INSURANCE
COMPANY, FEDERAL INSURANCE COMPANY,
RELIANCE NATIONAL INDEMNITY COMPANY,
CHICAGO INSURANCE COMPANY and HARDFORD
FIRE INSURANCE COMPANY.

Third Party Defendant,

IVORY HOLDING CORP.,

Second Third-Party Plaintiff,

-against-

CLAIMS ADMINISTRATION CORPORATION,

Second Third-Party Plaintiff.

The following papers numbered 1 to 5 read on this motion for summary judgment of all claims of Plaintiff American Home Assurance Company, noticed on November 22, 2000 and duly submitted as No.90 on the Motion Calendar of January 10, 2005 of Part LA9

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion, Affirmation (Fogel), Affirmation (Leibman) & Exhibits	1, 2, 3, 4
Memorandum of Law	5

Upon the foregoing papers, and after reassignment of this matter from Justice Paul Victor on January 10, 2005, Defendant, Ivory Holding Co. Inc., (Ivory) seeks an Order pursuant to CPLR §3212 granting summary judgment on all claims brought by American Home Assurance Company (AIG) against Ivory; Defendant, Ivory further seeks an Order pursuant to CPLR §3212 granting summary judgment on all claims asserted by Ivory against AIG; and Defendant, Ivory requests that this matter be set down for a hearing pursuant to CPLR§3212(c) to determine damages and attorney's fees.

This is a declaratory judgment action in which the Plaintiff, AIG seeks a declaration that they are not obligated to defend or indemnify Ivory because of untimely notice of a lead paint poisoning personal injury action commenced against Ivory. On or about, January 6, 1997, AIG disclaimed coverage based upon the purported failure of Ivory to comply with the policy's notice of "occurrence" condition i.e., notice of a lead paint abatement order issued by the New York City Department of Health on March 4, 1994. The Defendant, Ivory brings the instant motion seeking an Order from this Court that the disclaimer was untimely as a matter of law. Defendant claims that AIG learned of the abatement order on October 22, 1996 a delay of 76 days before issuance of the disclaimer of coverage.

New York Insurance Law §3420(d) requires an insurer to disclaim or deny coverage for bodily injury by written notice "as soon as is reasonably possible". The failure to timely notify insured precludes effective disclaimer. See: *Fireman's Fund Insurance Company of Newark v. Hopkins*, 88 N.Y.2d 836 (1996) Even where the disclaimer is based upon an insurance policy exclusion, such as failure to notify of a Notice to Abate, insurer is still required to tender a timely disclaimer. *Markevics v. Liberty Mutual Insurance Co.*, 97 N.Y.2d 646 (2001) Under New York law the onus is on the insurer to justify any delay in notifying insured of its disclaimer. *Mount Veron Fire Ins. Co. v. Harris*, 193 F.Supp.2d 674 (2002) In the absence of an explanation for the delay, a delay of over two months by an insurer in disclaiming coverage is unreasonable as a matter of law. *Vecchiarelli v. Continental Insurance Co.*, 277 A.D.2d 992 (4th Dept. 2000) In the instant case AIG failed to give notice of their intention to disclaim for 76 days after the completion of their investigation. Additionally, AIG gives no explanation for the delay and has failed to submit any opposition to Ivory's claims.

It is well established that attorneys fees are not ordinarily recoverable in the absence of a statute or an enforceable contract provision. *United States Fidelity & Guaranty Co. v. Braspetro Oil Services Co.*, 369 F.3d 34 (2nd Cir. 2004) However, "New York courts have carved out a 'narrow exception' to the general 'American' rule that a prevailing party cannot recover attorneys' fees." *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 369 F.3d 102, 110 (2nd Cir. 2004) In New York the rule is that attorneys' fees may not be recovered in an affirmative action brought by an assured to settle its rights. An exception exists where the insured has been cast in a defensive posture by the legal steps the insured has taken to free itself from its policy obligations. *Mighty Midgets, Inc. v. Centennial Insurance Co.*, 47 N.Y.2d 12 (1979); also see, e.g. *National Grange Mutual Ins. Co. v. Udar Corp.*, 98 Civ. 4650 (S.D.N.Y. 2002) "[A]n insured

who prevails in a declaratory action brought by an insurance company seeking to deny a duty to defend and indemnify is allowed to recover fee expended in defending against that action." *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, supra at 110. Accordingly, this matter is set down for a hearing on the issue of attorneys' fees. All parties are directed to appear on April 5, 2005, 2:00P.M. Supreme Court, Bronx County Trial Term Part 15, held in the Courthouse located at 851 Grand Concourse, Bronx, New York, Room 411M.

Therefore it is

ORDERED, that Defendant, Ivory Holding Co. Inc's., motion for an Order pursuant to CPLR §3212 seeking summary judgment on all claims asserted against Ivory Holding Co. Inc. by Plaintiff, American Home Assurance Company is **granted**, and it is further

ORDERED, that Defendants, Ivory Holding Co. Inc's., motion for an Order pursuant to CPLR §3212 seeking summary judgment on all claims asserted by Ivory Holding Co. Inc., against Plaintiff, American Home Assurance Company is **granted**, and it is further

ORDERED, that this matter is set down for a hearing pursuant to CPLR§3212(c) to determine damages and attorney's fees on April 5, 2005, 2:00P.M. Supreme Court, Bronx County Trial Term Part 15, held in the Courthouse located at 851 Grand Concourse, Bronx, New York, Room 411M.

Dated: February 9, 2005

Mary Ann Brigantti-Hughes
Mary Ann Brigantti-Hughes, JSC