SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **38M**

Justice

----------X

STARR INDEMNITY AND LIABILITY COMPANY,

Plaintiff,

- v -

STATE NATIONAL INSURANCE COMPANY and NEW YORK MARINE & GENERAL INSURANCE COMPANY,

Defendants.

----------X

INDEX NO. 652294/2023

MOTION DATE 02/14/2024, 02/16/2024

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 98, 99, 100, 101, 104, 105, and 106

were read on this motion by defendant State Nat'l Ins. Co. for SUMMARY JUDGMENT & Cross-Motion by plaintiff for summary judgment.

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 102, and 103

were read on this motion by defendant NY Marine & Gen'l Ins. Co. for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.S.C.

Upon the foregoing documents, defendants' motions for summary judgment are granted, for the reasons set forth in the in the moving and reply papers (NYSCEF Docs. Nos. 34, 56, 58, 60, 75-76, 98-99, 102, 104) and the exhibits attached thereto, in which the court concurs, as summarized herein. Plaintiff's cross-motion for summary judgment is denied.

In this insurance coverage declaratory judgment action, plaintiff seeks a declaration that defendants must reimburse it for prejudgment interest paid by plaintiff in relation to a settlement of the Labor Law action captioned *Gajewski v Willtrout Realty, LLC, et al*, bearing Index No. 507505/2017 and previously pending before the Supreme Court, Kings County (the "underlying action"). It is undisputed that defendant State National Insurance Company ("SNIC") provided

primary and non-contributory additional insured coverage to Willtrout Realty, LLC ("Willtrout") in the underlying action, with defendant New York Marine & General Insurance Company ("NYM") providing the second layer of coverage, and plaintiff the third (statement of undisputed facts, NYSCEF Doc. No. 33, ¶ 13). By decision and order dated December 19, 2019, the court in the underlying action awarded Gajewski summary judgment on liability (decision and order, NYSCEF Doc. No. 43). Following a trial, on November 22, 2022, the jury in the underlying action found for Gajewski in the amount of $5,812,000.00 (verdict extract, NYSCEF Doc. No. 44). A post-trial mediation was held, resulting in a settlement of $5,250,000.00 (email dated March 3, 2023 from Kutner to Ferrari, et al., NYSCEF Doc. No. 49). Prior to the settlement, SNIC and NYM had tendered their respective $1,000,000 and $2,000,000 policy limits. Plaintiff now seeks to hold SNIC and NYM liable for prejudgment interest that accrued between the judgment on liability and the jury verdict, over and above their policy limits.

The crux of the dispute is an identical provision in each of defendants' policies titled "Supplementary Payments – Coverages A and B" (SNIC policy, NYSCEF Doc. No. 36 at SNIC 000012-13; NYM policy, NYSCEF Doc. No. 37 at NYM 0000661-62). The policies provide that defendants will pay, "with respect to any claim we investigate or settle, or any 'suit' against an insured we defend . . . f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer" (*id.*). Plaintiff essentially argues that the settlement should be treated as a judgment, and defendants should pay prejudgment interest accordingly. Defendants argue that the provision specifically requires a judgment, interest was not part of the verdict, and the record does not indicate that any portion of the settlement was specifically for an amount of prejudgment interest.

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, "the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]). Moreover, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assoc. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

"The unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning" (*Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 130-31 [1st Dept 2006]). The policy should be read as a whole, and no particular words or phrases should receive undue emphasis (*Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]). Courts should give effect to every clause and word of an insurance contract (*Northville Indus. Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 89 NY2d 621, 633 [1997]). An interpretation is incorrect if "some provisions are rendered meaningless" (*County of Columbia v Continental Ins. Co.*, 83 NY2d 618, 628 [1996]). It is the insured's burden to show that the

provisions of a policy provide coverage (*BP A.C. Corp. v One Beacon Ins. Group*, 33 AD3d 116, 134 [1st Dept 2006]). Moreover, where the policy language offers no reasonable basis for a difference of opinion, the court should not find it ambiguous (*Breed v Insurance Co. of N.A.*, 46 NY2d 351, 355 [1978]).

To begin with a basic premise, a settlement is not a final judgment. By statute, "Interest shall be recovered upon the total sum awarded, including interest to verdict, report or decision, in any action, from the date the verdict was rendered or the report or decision was made to the date of entry of final judgment" (CPLR 5002). A stipulation of settlement is not included within the realm of the statute (*Mahoney v Brockbank*, 142 AD3d 200, 204-05 [2d Dept 2016] ["Whatever reasons the parties may have had for entering into the stipulation, they resolved those issues in a manner conceptually different from the methods that result in verdicts, reports, or decisions"]). A settlement agreement that does not include an award of interest entered into following a verdict does not give rise to an award of interest (*Vargas v Marquis*, 65 AD3d 1332, 1333 [2d Dept 2009] ["we agree with the defendants that pursuant to the terms of the high-low stipulation at issue, the plaintiff's counsel was obligated to furnish a stipulation of discontinuance and general release—not to submit a judgment containing a substantial amount of interest and costs—"regardless of what the verdict is" and for "whatever [the] number was"]). The court does not find *Singer v Arif* (2017 NY Slip Op 30371[U] [Sup Ct, New York County 2017]),[1] cited by plaintiff, to be persuasive, as it appears to be contradicted by the above appellate case law. Moreover, as even the *Singer* court found, the obligation for an insurer to pay prejudgment interest depends on the policy language (*Singer*, 2017 NY Slip Op 30371[U], *3 ["whether FICA is responsible for paying the interest on a $100,000 settlement or whether Defendants are

[1] The other cases cited by plaintiff involve the unremarkable proposition that interest, where it is recoverable in a personal injury action, runs from the judgment on liability.

responsible largely depends on the language in their policy"]). Here, the verdict was never reduced to a final judgment, and thus the obligation of defendants to pay interest was not triggered unless the settlement specified that defendants had such an obligation.

Allied World Assur. Co. (U.S.) Inc. v Greater New York Mut. Ins. Co. (223 AD3d 553 [1st Dept 2024]), discussed by both sides, is instructive. There, the trial court directed the defendant primary insurance company to pay prejudgment interest on a post-verdict settlement. The Appellate Division, First Department, reversed, holding that the plaintiff excess insurance company "failed to establish the amount of interest that was factored into the payment settling the underlying action" (*id.* at 555). Specifically, the plaintiff "made no showing that the accrued interest was actually a component of the settlement, as the $3.3 million verdict did not include interest and the release in the underlying action did not make any reference to the payment of interest as part of the settlement" (*id.*). Moreover, "even assuming that the accrued interest was a component of the settlement, [the plaintiff] did not make a specific showing as to exactly what portion of the settlement constituted interest" (*id.*). Here, the proof submitted by plaintiff establishes that, at best, the issue of prejudgment interest was within contemplation, but the settlement agreement itself is nowhere in the record. The verdict made no reference to prejudgment interest (verdict extract, NYSCEF Doc. No. 44), and neither does the release entered in conjunction with the settlement (release, NYSCEF Doc. No. 70). Without the agreement, there is no cognizable proof in the record that any portion of the settlement was for accrued interest. Plaintiff has, therefore, failed to meet its burden to show that defendants must pay such interest under the policy (*Moleon v Kreisler Borg Florman Gen. Const. Co., Inc.*, 304 AD2d 337, 339 [1st Dept 2003] ["The party claiming insurance coverage has the burden of

proving entitlement"]).

Accordingly, it is hereby

ORDERED that the motions of defendants State National Insurance Company and New York Marine & General Insurance Company (Mot. Seq. Nos. 002 and 003, respectively) for summary judgment dismissing the action are granted, and plaintiff's cross-motion for summary judgment is denied; and it is further

ADJUDGED and DECLARED that said defendants are not liable for prejudgment interest in addition to their limits under their respective policies in connection with the settlement of the underlying action; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants dismissing the action, with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the decision and order of the court.

ENTER:

Louis L. Nock

11/14/2024
DATE

LOUIS L. NOCK, J.S.C.

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