0123688/2002

ADMIRAL INDEMNITY CO.
VS
467 CONDONMIMIUM

SEQ 3

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE SEP 1 4 2005

MOTION SEQ. NO. _____

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

Motion is decided in accordance with accompanying Memorandum Decision.

Dated: JAN 2 4 2005

HON. THEODORE JACKSON

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

COUNTY OF NEW YORK

X

ADMIRAL INDEMNITY COMPANY,

Plaintiff,

-against- Index No. 123688/02

THE BOARD OF MANAGERS OF THE 467 CONDOMINIUM AND THE 467 CONDOMINIUM CLAUDIO TITONE,

Defendants.

X

DeGrasse, J.:

Plaintiff, Admiral Indemnity Company, moves and defendants the Board of Managers of the 467 Condominium and 467 Condominium (collectively "the Condominium") cross-move for summary judgment. Beginning in 1991, Admiral insured the Condominium under a series of commercial general liability policies. In 1999, defendant Claudio Titone, a unit owner, sued the Condominium for property damage caused by the infiltration of water into his apartment. Titone's first cause of action sounded in contract and was based upon breaches of the Condominium's declaration, by-laws, rules and offering plan. Titone's fifth cause of action sounded in negligence. Admiral provided the Condominium with a defense throughout the lawsuit without a reservation of rights. Claims on both theories, contract and negligence, were submitted to a jury. On September 23, 2002, the jury exonerated the Condominium on the negligence claim but rendered a $200, 000 verdict against it on the contract claim. By letter to the Condominium dated October 9, 2002, Admiral disclaimed coverage on the grounds that: (1) the breach of the Offering Plan was not an "occurrence" as defined by its policy; (2) the policy excluded contractual liability; and (3) the breach of the Offering Plan was not an offense of

prayed for in the complaint is a judgment declaring that Admiral has no duty to indemnify the Condominium or to continue its defense. By its counterclaim, the Condominium seeks a declaration that it is entitled to indemnification and continued defense by Admiral.

Principles of equitable estoppel apply "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." (*Schiff Assocs. v Flack*, 51 NY2d 692, 699 [1980]; *Gen. Acc. Ins. Co. of Am. v Metro. Steel Indus.*, 9 AD3d 254 [2004]). The affidavit of Rosemary Paparo, the Condominium's Assistant Vice President, is undisputed insofar as she asserts that Admiral undertook the Condominium's complete defense without a reservation of any right to disclaim coverage or any disclaimer until after the verdict was rendered. In addition, prior to jury selection, the assigned defense counsel advised Admiral of the Condominium's possible exposure under the contract claims. Admiral did not pass the advice on to the Condominium. Citing *Sedgwick Avenue Associates v Insurance Company of the State of Pennsylvania* (203 AD2d 93 [1994]), Admiral asserts that equitable estoppel does not apply because the Condominium was not prejudiced. As noted above, an insured's loss of control of its defense constitutes prejudice. Also, *Sedgwick* is distinguishable for two reasons. First, the insurer's policy in *Sedgwick* did not cover the premises where the accident occurred. Second, the insureds in *Sedgwick* had been offered but declined the opportunity to retain counsel to protect their own interests above a certain dollar amount.

For the foregoing reasons, Admiral's motion is denied. The Condominium's cross motion is granted to the extent that it is adjudged and declared that Admiral is estopped from denying coverage under the Condominium's policy. It is further adjudged and declared that Admiral is obligated to defend and indemnify the Condominium against Titone's claims. It is further adjudged and declared that Admiral's disclaimer is of no effect.

The Condominium is also seeking reasonable attorneys' fees. An insured who is "cast in a defensive posture by the legal steps an insurer takes in an effort to free itself from its policy obligations," and who prevails on the merits, may recover attorneys' fees incurred in defending against the insurer's action (*Mighty Midgets v Centennial Ins. Co.*, 47 NY2d 12 [1979]). Accordingly, the Condominium shall recover from Admiral the reasonable amount of costs including attorneys' fees it incurred in its defense in this action. In addition, the Condominium shall recover the reasonable amount of defense costs, including attorneys' fees, it has incurred in the prosecution of the appeal in the Titone action (*cf. Tishman Const. Corp. of New York v Mfrs. Mut. Ins. Co.*, 303 AD2d 323 [2002]).

This matter is referred to the IAS Judicial Support Office for assignment to a special referee to hear and report with recommendations on the reasonable amount of the Condominium's costs. Pending receipt of the special referee's report and a CPLR 4403 motion final determination of the issue shall be held in abeyance. As a condition of the foregoing relief, the Condominium shall file a copy of the judgment and order to be settled with the Judicial Support Office within 15 days after entry. **Settle judgment and order.**

Dated: January 24, 2005

J. S. C.