

**SUPREME COURT OF THE STATE OF NEW YORK**  
*Appellate Division, Fourth Judicial Department*

**348**

**CA 15-01113**

PRESENT: SMITH, J.P., DEJOSEPH, NEMOYER, TROUTMAN, AND SCUDDER, JJ.

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LAFRAMBOISE GROUP LTD., PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

COMMERCIAL UNDERWRITERS INSURANCE COMPANY,  
LYONS FALLS PULP & PAPER, INC., WALT WILMSHURST,  
BOURDON'S INSURANCE AGENCY, INC.,  
DEFENDANTS-RESPONDENTS,  
ET AL., DEFENDANT.

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FISCHER, BESSETTE, MULDOWNEY & HUNTER, LLP, MALONE (MATTHEW H. MCARDLE OF COUNSEL), FOR PLAINTIFF-APPELLANT.

SCHMITT & LASCURETTES, LLC, UTICA (WILLIAM P. SCHMITT OF COUNSEL), FOR DEFENDANTS-RESPONDENTS WALT WILMSHURST AND BOURDON'S INSURANCE AGENCY, INC.

COSTELLO, COONEY & FEARON, PLLC, CAMILLUS (MEGAN E. GRIMSLEY OF COUNSEL), FOR DEFENDANT-RESPONDENT COMMERCIAL UNDERWRITERS INSURANCE COMPANY.

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Appeal from a judgment (denominated order and judgment) of the Supreme Court, Oneida County (Bernadette T. Clark, J.), entered February 12, 2014. The judgment, among other things, granted that part of the motion of defendant Commercial Underwriters Insurance Company seeking summary judgment dismissing plaintiff's amended complaint against it, and granted the cross motion of defendants Walt Wilmshurst and Bourdon's Insurance Agency, Inc. seeking summary judgment dismissing plaintiff's complaint against it.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reinstating the amended complaint against defendant Commercial Underwriters Insurance Company to the extent that it seeks a declaration and granting judgment in favor of that defendant as follows:

It is ADJUDGED and DECLARED that plaintiff is not entitled to indemnification or a defense from defendant Commercial Underwriters Insurance Company in the underlying action,

and as modified the judgment is affirmed without costs.

Memorandum: We conclude, for reasons stated in the decision at

Supreme Court, that plaintiff is not entitled to the relief sought in the amended complaint against defendant Commercial Underwriters Insurance Company (CUIC) or the complaint against defendants Walt Wilmshurst and Bourdon's Insurance Agency, Inc. We note, however, that the court erred in dismissing the amended complaint against CUIC to the extent that it seeks declaratory relief rather than declaring the rights of the parties (see *Pless v Town of Royalton*, 185 AD2d 659, 660, *affd* 81 NY2d 1047; see also *Teague v Automobile Ins. Co. of Hartford, Conn.*, 71 AD3d 1584, 1586; *Ward v County of Allegany*, 34 AD3d 1288, 1289). We therefore modify the judgment accordingly, and we grant judgment declaring that plaintiff is not entitled to indemnification or a defense from CUIC in the underlying action.

Entered: May 6, 2016

Frances E. Cafarell  
Clerk of the Court