

**XL Ins. America, Inc. v Lumbermens Mut.
Cas. Co.**

2009 NY Slip Op 30021(U)

January 5, 2009

Supreme Court, New York County

Docket Number: 601852/07

Judge: Doris Ling-Cohan

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

JUSTICE DORIS LING-COHAN

PRESENT: _____

PART 36

Index Number : 601852/2007

XL INSURANCE AMERICA

vs

LUMBERMENS MUTUAL

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 7 motion to/for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Repeating Affidavits

Cross-Motion: Yes No

PAPERS NUMBERED

1, 2

3, 4

5

6

7

Upon the foregoing papers, It is ordered that this motion + cross motion

are decided as per memorandum decision

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

JUSTICE DORIS LING-COHAN

Dated: 1/5/09

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

----- X
XL INSURANCE AMERICA, INC.,

Plaintiff,

Index No. 601852/07

-against-

Motion Seq. No. 001

LUMBERMENS MUTUAL CASUALTY COMPANY,

Defendant,

DORIS LING-COHAN, J.:

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Defendant Lumbermens Mutual Casualty Company ("Lumbermens") moves: (i) to dismiss each cause of action asserted by plaintiff XL Insurance America, Inc. ("XL") pursuant to CPLR 3211(a)(2) on the ground that the Court does not have subject matter jurisdiction; and (ii) for summary judgment dismissing the causes of action asserted against it. XL cross-moves for summary judgment pursuant to CPLR 3212 and 3001 declaring that Lumbermens has a duty to defend and indemnify its named insured Parmalat USA Corp. ("Parmalat") on an equal basis with XL (except for the first \$250,000 of any settlement, verdict or judgment) with respect to the underlying personal injury action Anibel Pinero, et al. v Parmalat USA Corp., Index No. 46486/02, Supreme Court of the State of New York, Kings County (the "Pinero Action").

This declaratory judgment action presents insurance coverage issues pertaining to the Pinero Action. Anibal Pinero ("Pinero") was a truck driver employed by Derle Farms, Inc. ("Derle"). On February 23, 2002, Pinero allegedly sustained personal injuries when he slipped and fell on heavy cream on the floor of a trailer owned by Derle, which had been loaded by Parmalat employees with Parmalat dairy products. Pinero commenced the underlying action

against Parmalat in October 2002. The complaint alleges that Parmalat was negligent in loading the truck and allowing cream or another slippery substance to accumulate on the floor of the trailer (Portuguese Affirm, Exh 1 ¶ Seventh). At the time of Pinero's accident, Parmalat was insured under a commercial automobile policy issued by Lumbermens with policy limits of \$1,000,000 per accident, subject to a \$250,000 deductible (the "Lumbermens Policy"). Parmalat was also insured under a commercial general liability policy issued by XL with policy limits of \$1,000,000 per occurrence, which had a deductible ranging from \$5,500 to \$27,000 (the "XL Policy").

In January 2003, Lumbermens agreed to defend Parmalat in the Pinero Action. In February 2004, Parmalat filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code, which triggered an automatic stay of all actions and proceedings against it (see 11 USC § 362). By stipulation and order dated January 6, 2006 (the "Pinero Order"), the bankruptcy court released and discharged Parmalat from any claims asserted against it in the Pinero Action, but allowed Pinero, Parmalat and the unsecured creditors' trust "to prosecute and defend against the [Pinero Action] solely to the extent that that [sic] insurance coverage exists to cover the cost of the litigation of the Complaint and any possible judgment or settlement related thereto" (Steinke Affirm, Exh J at 5, ¶ R). On March 12, 2007, Lumbermens disclaimed coverage to Parmalat.

XL commenced this action in June 2007 seeking a judgment: (i) declaring that Lumbermens' disclaimer of coverage is invalid and that Lumbermens is obligated to defend and indemnify Parmalat for any verdict, judgment or settlement in the Pinero Action; (ii) declaring that Lumbermens is estopped from denying coverage to Parmalat and is therefore obligated to defend and indemnify Parmalat for any verdict, judgment or settlement in the Pinero Action; (iii)

declaring that Lumbermens and XL are co-insurers and have a duty to share equally the defense costs as well as the costs of any verdict, judgment or settlement in the Pinero Action; (iv) declaring that the XL umbrella policy is excess over the Lumbermens Policy and the XL Policy, and that XL is not required to indemnify Parmalat under the umbrella policy until the combined \$2,000,000 policy limits have been fully exhausted; and (v) awarding XL costs, attorneys' fees and disbursements (see Steinke Affirm, Exh D at 8-9).

Lumbermens has now moved to dismiss XL's complaint for lack of subject matter jurisdiction over Parmalat's assets because those assets are under the exclusive jurisdiction of the bankruptcy court. Lumbermens further asserts that it is entitled to summary judgment dismissing the causes of action asserted against it on the ground that the Lumbermens Policy does not provide coverage to Parmalat because Parmalat employees were not engaged in the "use" of the Derle truck when Pinero sustained his injuries.

The part of the motion that seeks to dismiss the complaint for lack of subject matter jurisdiction is denied. The Pinero Order addressed the issue of insurance coverage, which gave rise to this action. While the Pinero Order does not specifically refer to the Lumbermens Policy, it does provide for the underlying action to go forward to the extent insurance coverage exists. Therefore, since Pinero is entitled to continue his claim against XL, XL should not be prohibited from bringing this declaratory judgment action against another insurance company, which might be responsible to provide coverage for some of the verdict, judgment or settlement in the underlying action. To not allow XL to bring such an action against another insurance company with an applicable policy would frustrate the interests of justice.

In addition, by letter agreement with XL's attorneys dated June 30, 2008, Parmalat's

bankruptcy plan administrator agreed that Parmalat does not have a direct interest in the outcome of the instant litigation between its co-insurers and consented to XL's prosecution of this action (see Portuguese Reply Affirm, Exh F at 2). The letter agreement simply reinforces the Court's opinion that this action does not affect Parmalat's assets and may go forward.¹

The part of Lumbermens' motion that seeks summary judgment is also denied. Lumbermens contends that its policy does not provide coverage to Parmalat in the Pinero Action. The Lumbermens Policy provides coverage for bodily injury caused by an accident arising from the "ownership, maintenance or use" of a covered auto (see Mensie Aff, Exh 1, Business Coverage Form CA 00 01, at 2 of 13). Lumbermens argues that Parmalat is not covered because Pinero's accident did not arise from the "use" of the vehicle and, as such, was not proximately caused by the condition of the vehicle. However, an automobile liability policy providing coverage for accidents arising from the ownership, maintenance or use of a motor vehicle without express reference to loading and unloading is deemed to afford loading and unloading coverage (see Paul M. Maintenance, Inc. v Transcontinental Ins. Co., 300 AD2d 209, 211 [1st Dept 2002]; see also Argentina v Emery World Wide Delivery Corp., 93 NY2d 554, 557-58 [1999] ["use" of vehicle includes loading and unloading]). Such coverage "embraces any negligence in the process of loading and unloading" (Axton Cross Co. v Lumbermens Mut. Cas. Co., 176 AD2d 482, 482 [1st Dept 1991]). Here, Pinero's injuries allegedly arise from negligence in the loading of the Derle truck. Pinero contends that, during and subsequent to the loading of the truck, Parmalat employees negligently left a slippery substance on the floor of the truck,

¹ The Court notes that since the letter agreement and, thus, related new arguments first appear in XL's reply papers, the Court granted Lumbermens the opportunity to submit surreply papers.

which caused him to slip at some later point in time, when he was checking his deliveries and re-arranging them since they were improperly loaded (Steinke Affirm, Exh E at 2; Exh F at 18-31). Although the accident did not happen at the exact moment that the truck was being loaded, it matters not that "the injuries were sustained at a time and place far removed from that process" (id.). Since Lumbermens cannot disclaim coverage based on the above arguments, XL's cross motion for summary judgment declaring that Lumbermens has a duty to defend and indemnify Parmalat with respect to the Pinero Action on an equal basis with XL, except for the first \$250,000 of any settlement, verdict or judgment, is granted.

In view of the Court's finding that the Lumbermens Policy provides coverage, the parties' remaining arguments need not be considered.

Accordingly, it is

ORDERED that Lumbermens' motion for an order dismissing the complaint and granting it summary judgment is denied in its entirety, and it is further

ORDERED that XL's cross motion is granted to the extent that it is hereby

ADJUDGED and DECREED that Lumbermens has a duty to defend and indemnify its named insured Parmalat on an equal basis with XL with respect to the underlying Pinero Action, except for the first \$250,000 of any settlement, verdict or judgment. In all other respects, the cross motion is denied.

This constitutes the decision, judgment and order of the Court.

DATED: 4/5/09

ENTER :

~~This judgment has not been entered by the County Clerk and notice of entry cannot be given based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).~~ J.S.C. FUCHAN

J:\INDEMNIFICATION\XL.Lumbermens - use of vehicle, bankruptcy of insured.wpd