

Cipriani USA, Inc. v Utica First Ins. Co.

2009 NY Slip Op 31948(U)

August 18, 2009

Supreme Court, New York County

Docket Number: 115389/08

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 115389/2008

CIPRIANI USA

VS.

EMANUEL GARY G.

SEQUENCE NUMBER : 003

DISMISS

INDEX NO. _____

MOTION DATE 6/2/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

FILED
AUG 19 2009

COUNTY CLERK'S OFFICE
NEW YORK

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that Utica's motion pursuant to CPLR 3211(a)(1) & (7), and CPLR 3211(c) for an order dismissing the Complaint and all cross-claims asserted against it, and declaring, pursuant to CPLR §3001, that Utica has no obligation to defend or indemnify any party, including plaintiff Cipriani or Indigo in connection with the Underlying Lawsuit and the third-party action filed against Indigo, is granted pursuant to CPLR 3211(a)(1). And it is further

ORDERED that the Clerk may enter judgment accordingly. And it is further

ORDERED that the remaining parties appear for a Preliminary Conference on October 13, 2009, 2:15 p.m. And it is further

ORDERED that Utica serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 8/18/09


HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
CIPRIANI USA, INC., as assignee of INDIGO BLUE
GROUP, INC.,

Plaintiff,

Index No.: 115389/08

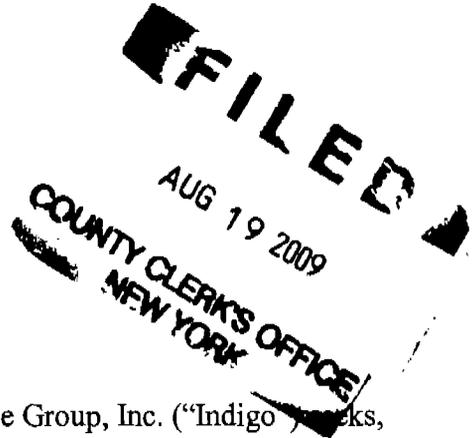
-against-

DECISION/ORDER

UTICA FIRST INSURANCE COMPANY, MORSTAN
GENERAL AGENCY, INC. and GARY G. EMMANUEL
BROKERAGE, INC.,

Defendants.

-----X
HON. CAROL ROBINSON EDMEAD, J.S.C.



MEMORANDUM DECISION

Cipriani USA, Inc. ("Cipriani") as assignee of Indigo Blue Group, Inc. ("Indigo") seeks, *inter alia*, a judgment against Utica First Company ("Utica") based on an Affidavit of Confession of Judgment by Indigo, wherein Indigo consented for Cipriani to have judgment in the amount of \$88,462.64 against Indigo on Cipriani's contractual indemnification claim made in connection with an underlying lawsuit commenced against Cipriani ("the Underlying Lawsuit") and the third-party action filed by Cipriani against Indigo therewith.¹

Utica now moves pursuant to CPLR 3211(a)(1) & (7) to dismiss the Complaint and all cross-claims asserted against it, and, since there is no question of material fact that, this Court treat the motion as one for summary judgment pursuant to CPLR 3211(c) and declare, pursuant to CPLR §3001, that Utica has no obligation to defend or indemnify any party, including plaintiff

¹ In its third cause of action against Utica, Cipriani alleges that Utica breached its duty to defend and indemnify Indigo, and that the contractual liability exclusion, Form XCNTR, upon which Utica relied to disclaim coverage was never approved by the New York State Insurance Department (the "Insurance Department") as required. Plaintiff's fourth cause of action on behalf of Cipriani, individually, likewise alleges that the employee exclusion asserted by Utica was never approved by the Insurance Department.

Cipriani or Indigo in connection with the Underlying Lawsuit and the third-party action filed against Indigo.

*Factual Background*²

Cipriani, as owner of the premises located at 473 West Broadway, New York, New York, retained Indigo to perform work at the premises pursuant to a contract, dated June 11, 2003 (the "Indigo Contract"). On or about October 18, 2003 Kamile Szuba ("Szuba") was injured when, during the course of his employment for Indigo, he fell through a temporary floor above a hole ("the Accident"). In 2006, Szuba sued, *inter alia*, Cipriani and Cipriani impleaded Indigo for contractual indemnification. In October of 2007 Indigo consented to the settlement of the Underlying Lawsuit for \$75,000.00 and to judgment over for contractual indemnification in the amount of \$88,462.64, which included attorneys' fees. Indigo then assigned and transferred all rights, title and interest to Cipriani for all claims, demands and causes of action which Indigo had against Utica, Gary G. Emmanuel Brokerage, Inc. and Morstan Agency, Inc. in consideration of the Cipriani's payment of the settlement.

Motion

Utica contends that the Policy contains an exclusion for bodily injuries sustained by employees of Indigo, as well as by contractors and employees of contractors hired or retained by or for Indigo ("the Employee Exclusion") as well as an exclusion for liabilities assumed under contract or agreement ("the Contractual Liability Exclusion").³

² The Factual Background is taken from Utica First's motion, and the pleadings in the Underlying Action and instant action.

³ Utica claims it was first notified of the Accident when it received correspondence from Clermont Specialty Managers, Ltd. ("Clermont") dated February 6, 2004, demanding that Utica assume the defense of

Utica argues that Cipriani's claim that it is entitled to coverage for the Accident and the Underlying Lawsuit based upon its status as a purported additional insured under the Policy lacks merit, as Cipriani is not an additional insured under the Policy. The Policy reveals that Cipriani is not named as an insured or an additional insured pursuant to any specific endorsement. Rather, the Policy contains a Blanket Endorsement, which provides in Item 7.d that "Insureds" includes "Any person or organization whom you are required to name as an additional insured on this policy under a written contract or agreement." There must be a "written contract or agreement" obligating Indigo to name Cipriani as an additional insured under the Policy before the endorsement is triggered, and the Indigo Contract does not contain any provision requiring the procurement of any insurance coverage for Cipriani. The Indigo Contract specifically states that Indigo is not required to name Cipriani as an Additional Insured on the Policy. Thus, summary judgment is warranted in Utica's favor declaring that it has no coverage obligations to Cipriani for the Accident and resulting lawsuits.

Further, Cipriani's claim that Utica's disclaimer to Indigo was somehow invalid, and that the Court should enter judgment in its favor in the amount that Indigo confessed to it based upon this allegedly invalid disclaimer, lacks merit because Cipriani lacks standing to challenge Utica's disclaimer. A stranger to an insurance contract, such as Cipriani vis-a-vis the Policy, has no

footnote 3 cont'd.

"Downtown Rest, c/o Cipriani USA" and indemnify it in connection with the Underlying Lawsuit. By letter dated February 24, 2004, Utica disclaimed coverage to Indigo for the Accident and the Underlying Lawsuit based upon, *inter alia*, the Employee and Contractual Liability Exclusions contained in the Policy. By separate letter dated February 24, 2004, Utica declined to provide coverage to Cipriani for the Accident and the Underlying Lawsuit. On or about November 24, 2004, Clermont requested that Utica reconsider its coverage position in light of Indigo's obligation to indemnify Cipriani. By letter dated December 13, 2004, Utica reiterated its coverage position based on the Employee Exclusion. In January 2009, Utica received a copy of the Summons and Complaint in this action.

standing to commence an action against the insurance company based upon the policy unless and until it has obtained a judgment against the insured thereunder, and this judgment is left unsatisfied for thirty days or longer. The Affidavit of Confession of Judgment that Cipriani relies upon for its right to challenge Utica's coverage position vis-a-vis Indigo is insufficient as a matter of law for that purpose since it is settled that a Confession of Judgment is not a Judgment as is required by the Insurance Law in order to bring a direct action against an insurance company.

Additionally, the Employee Exclusion precludes coverage for the injuries sustained by Szuba. Utica argues that it is undisputed that Szuba was injured during the course of his employment for Indigo, and the Employee Exclusion precludes coverage for such injuries. Case law precludes coverage for claims raised against insureds and additional insureds alike so long as the underlying plaintiff was injured during the course of his employment for either of the insured entities. And, plaintiff's allegation that the Employee Exclusion should not apply because it was not filed with the Insurance Department, lacks merit. The Insurance Department explicitly recognized the validity of an employee exclusion contained within a general contractor's general liability policy. In a September 16, 2004 Opinion, the Insurance Department was asked whether an exclusion for injuries to employees in a general liability policy is valid, and in answering in the affirmative, the Insurance Department indicated that its decision was based upon the fact that the Insurance Department had given its approval of the subject endorsement, and that this approval "indicates that the New York State Insurance Department found the endorsement acceptable and not misleading or against public policy."

In addition, the Contractual Liability Exclusion also applies to preclude coverage for the claims asserted against Indigo which arise out of a contract or agreement. As evidenced by the

Affidavit of Confession of Judgment, which specifically states that Indigo confessed a judgment on account of Cipriani's "contractual indemnification claim" against it, all of the claims asserted against Indigo for which Cipriani seeks relief (*to wit*: the amounts confessed to by Indigo in the Affidavit of Confession of Judgment), arise out of the alleged Indigo Contract and are thus specifically precluded from coverage under the Contractual Liability Exclusion. Further, according to the Affidavit of Shawn Kain, Commercial Lines Manager for Utica, the State Insurance Department approved the Contractual Liability Exclusion (Form XCNTR) and, as noted in the Insurance Department Opinion above, and such exclusion has been recognized by the court, thereby establishing that this exclusion is valid.

Opposition

Plaintiff argues that to the extent Utica relies on CPLR 3211(a)(1) in that Utica's defense is based upon documentary evidence, the documentary evidence submitted by Utica is not only incomplete, selectively produced and deceptive, but also raises more questions than the documents purportedly answer. Utica's submission of selective correspondence and documents does not encompass all relevant communications and documents, and are insufficient to establish Utica's defense to plaintiff's claim. Thus, Utica's CPLR 3211(a)(1) motion must be denied.

Also, Utica makes no argument in support of dismissal under CPLR 3211(a)(7) for failure to state a cause of action. Further, the causes of action against Utica state claims based upon Utica's reliance upon an exclusionary endorsement which has not been approved by the Insurance Department, and is against public policy.

Further, the Court should not convert this motion to one for summary judgment. If this Court decides to treat this motion as one for summary judgment, it must first provide notice to

the parties, and give plaintiff an opportunity to make an appropriate record. Plaintiff cannot provide a complete evidentiary record as plaintiff has not had the opportunity to conduct discovery and the facts and evidence necessary to contest Utica's summary judgment motion are solely in the possession of Utica.

In addition, plaintiff has Certificates of Insurance which were issued by an agent of Utica and would therefore be binding upon Utica. No discovery has been undertaken, including on the issue of agency. Further, the exclusions upon which Utica relies and the evidence as to whether they have been approved by the Insurance Department is solely in the possession of Utica, and the documents produced by Utica in support of its motion are incomplete. Cipriani needs discovery on these issues in order to present its case pursuant to CPLR §3211(d).

Also, Utica's argument that Cipriani is not an additional insured under the Policy since the Indigo Contract does not contain any provision requiring the procurement of any insurance coverage for Cipriani fails to appreciate the significance of the indemnity clause in the Indigo Contract and the Certificate of Insurance which were procured by its insured Indigo for Cipriani. As set forth in such Certificate, the certificate holder [Cipriani] is named as an additional insured under the policy. Since the Certificate purports to be issued by Gary G. Emmanuel Brokerage, Inc. and Morstan Agency, Inc., and Cipriani claims that Morstan General Agency, Inc. and/or Gary G. Emmanuel Brokerage, Inc. are agents of Utica, Utica would be bound by that Certificate of Insurance.

Plaintiff also argues that the Certificate of Insurance is also being offered as part of the Indigo Contract to demonstrate that there was, in fact, a written agreement by Indigo to name Cipriani as an additional insured on its Policy - triggering additional insured coverage under the

Policy. Cipriani argues that the Certificate of Insurance is itself a "written contract to name [Cipriani] as an additional insured." It is a writing presented by Indigo to Cipriani to confirm Cipriani's requirement that Indigo procure insurance, an acknowledgment of that obligation, and evidence of compliance. The Second Department recently found that a certificate of insurance which included an indemnification provision, was *prima facie* evidence of a written contract to indemnify. Therefore, Cipriani demonstrated that it is entitled to coverage under the blanket additional insured provision of the Policy or that a question of fact exists to preclude summary judgment on behalf of Utica.

Further, Cipriani not only obtained a confession of judgment from Indigo, but a full assignment of all of Indigo's rights against Gary G. Emmanuel Brokerage, Inc., Morstan Agency, Inc. and Utica. Cipriani, which stands in the shoes of Indigo, Cipriani may make any claim that Indigo could make against Utica.

Plaintiff also argues that the papers submitted by Utica do not conclusively establish that the Employee Exclusion has been approved by the New York State Department of Insurance. The September 16, 2004 Opinion does not refer to an exclusion clause such as the one found in the Policy. The Opinion merely concludes that "The exclusion for injuries to employees in the general contractor's general liability policy issued by ABC Insurance Company is valid." However, the exclusion in the Policy issued by ABC Insurance Company is not annexed, and there is no indication that the exclusion upon which the opinion was based is the same one as annexed to the Policy or as far reaching as the one in the Policy which not only excludes coverage for employees of the insured, but also excludes coverage for injuries to contractors, contractors employees, or any obligation of the insured to indemnify another for such injuries.

There is no basis to conclude that the Opinion applies to the Employee Exclusion in the Policy.

Furthermore, regarding the Employee Exclusion, the December 5, 2000 letter from the Insurance Department refers to facsimiles of November 10, 13, 20, 28, and 30, 2000 amending the captioned filing. However, Utica failed to provide copies of these facsimiles which amended the filing and therefore Cipriani and the Court have no way of knowing what those amendments were and whether the form Employee Exclusion at issue is actually the form exclusion which the Insurance Department allegedly reviewed and allegedly approved.

The Employee Exclusion is also against public policy. Manalo Griffikas ("Griffikas"), the owner of Indigo, procured the Policy through Gary G. Emmanuel Brokerage, Inc. Griffikas states that he did not request an "Artisan General Liability Policy of Insurance," but requested a policy of liability insurance that would provide coverage for the general construction work that Indigo performs, and asked for insurance that would cover their contractual obligations, and that they are generally required to obtain additional insured coverage for their clients, which would provide coverage for injuries to employees and employees of contractors.

The Policy provides no more coverage than a general liability policy issued to a homeowner, which will provide coverage for injuries or property damage to third parties. This is certainly not appropriate in a commercial context. If the Policy contained the usual employee exclusion, it would only exclude coverage for claims covered by workers compensation. The usual employee exclusion excludes coverage for "Bodily injury" to an "employee" of the insured arising out of and in the course of employment by the insured, except for liability assumed by the insured under an "insured contract." Under the terms of this exclusion, the policy will cover the insured who contractually assumes the liability of others, and includes liability that the insured

assumes under an indemnity agreement, such as in the instant case. However, the exclusion at issue herein is a much broader employee exclusion, and excludes coverage not only to the insured's employees, but also to the employees of contractors and subcontractors. This exclusion in a policy issued to a contractor in essence provides the contractor with no coverage for the reasonable risks of doing business in New York. The proliferation of Labor Law claims alone, such as the Szuba claim makes it evident that a policy that provides no coverage for these types of claims is in essence a deception and should not be countenanced.

Further, any argument by Utica that Courts held the Employee Exclusion not to be against public policy is incorrect. All of the cases involving a challenge to the employee exclusion were addressing the usual employee exclusion quoted above, not the detailed and more expansive employee exclusion in the Utica policy at issue here. The Employee Exclusion herein is also against public policy as it reduced the coverage "to a mere facade," and should be declared void.

And, the Employee Exclusion is inconsistent with the Blanket Additional Insured Endorsement. Under the Blanket Additional Insured endorsement, the Policy covers an additional insured that Indigo is required to name as an additional insured under a written contract or written agreement. However, the person or organization is only an additional insured with respect to liability "arising out of 'Your work' for that additional insured for or by you." Making a provision for contractual liability coverage, which would clearly encompass the types of claims brought under New York Labor Law, and then taking away that same coverage by the Employee Exclusion Endorsement cannot possibly be countenanced by this Court. Since the Policy was drafted by Utica and the two endorsements are in conflict, the endorsement that provides coverage is the one that should survive. Therefore, the Employee Exclusion should be

ignored and coverage provided under the Blanket Additional Insured endorsement. Under the doctrine of "*contra proferentem*" the policy should be interpreted against the party who drafted it.

Further, since no copy of the Contractual Liability Exclusion accompanies Kain's affidavit or the letter, this Court cannot determine whether such exclusion is actually the one Utica claims it received approval for. Also, the letter to the Insurance Department is redacted, and may have contained other information pertinent to this Exclusion. It cannot be determined from these papers what, if anything, was reviewed by the Insurance Department in connection with Utica's request.

Reply

Utica argues that neither the indemnification agreement contained within the Indigo Contract nor the Certificate of Insurance, which indicates that it is issued "for information only" and that it is "subject to policy terms and conditions" is sufficient to establish that Cipriani is an additional insured under the Policy. A Certificate of Insurance can never be utilized to create coverage that does not exist in the first instance. In other words, a Certificate of Insurance is not a contract to insure. If Indigo has a claim against its broker, this is of no moment to Utica's coverage position because it is the four corners of the complaint which control the scope of insurance coverage.

The one, inapposite case from the Second Department cited by plaintiff has nothing to do with insurance coverage and, in fact, does not even involve an insurance company.

Even if this Court were to find questions of fact with respect to Cipriani's additional insured status under the Policy, it is respectfully submitted that Utica is, nevertheless, entitled to judgment as a matter of law since the Employee Exclusion applies to preclude coverage to all

parties, including Cipriani and Indigo, for the injuries sustained by Szuba during the course of his employment for Indigo.

Although Cipriani argues that the question of whether the Employee Exclusion was approved by the Insurance Department is not settled and that the application of this exclusion is "unfair" and somehow violates public policy is insignificant to this Court's analysis; the failure to file with the Insurance Department does not, in and of itself, mandate the nullification of the offending policy clause. Also, there are no statutory forms for the commercial general liability policy at issue herein; the Policy is not an automobile or Fire Insurance Policy which must contain certain statutory provisions as mandated by New York's Insurance Law and, as such, even if the Employee Exclusion was not being used with Insurance Department approval, it would still be effective for purposes of this Court's coverage analysis.

Utica also argues that the application of the Employee Exclusion to insureds and additional insureds alike does not offend public policy, but puts an additional insured on equal footing with a named insured for insurance coverage purposes. Under the Employee Exclusion, neither the insured nor the additional insured is entitled to coverage for work-related injury claims. There is nothing suspect about such a provision, and Courts have consistently applied identical and substantially identical exclusionary provisions without incident. Every insurance policy issued contains exclusions from coverage and the premium charged for these policies reflects the scope of the risks undertaken by the company based upon these exclusionary provisions. While it is true that the Employee Exclusion bars coverage for claims related to the injuries sustained by Indigo's employees, this is not to say that the Policy does not speak to other types of claims.

Finally, Cipriani's argument that the Employee Exclusion is somehow inconsistent with the Blanket Endorsement is misguided. The only thing that the Blanket Endorsement does is set forth the threshold requirements pursuant to which a party may or may not qualify an additional insured under the Policy.

However, even if the Blanket Endorsement were triggered in the case at bar, all that this does is place Cipriani in the position of being an "additional insured" under the Policy and all of the policy terms and conditions apply to the additional insured in the same manner as they apply to the insured, including any exclusionary provisions contained in the Policy.

Nor is additional discovery needed and Utica's motion is not premature. The Policy and the other exhibits attached to Utica's moving papers provides all of the information needed to determine the issues before this Court.

Analysis

Pursuant to CPLR 3211(a)(1), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that "a defense is founded upon documentary evidence." Where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law," dismissal is warranted (*Leon v Martinez*, 84 NY2d 83, 88, 614 NYS2d 972 [1994]). The test on a CPLR 3211(a)(1) motion is whether the documentary evidence submitted "conclusively establishes a defense to the asserted claims as a matter of law" (*Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001] citing *Leon v Martinez*, 84 NY2d 83, 88, *supra*; *IMO Indus., Inc. v Anderson Kill & Olick, P.C.*, 267 AD2d 10, 11, 699 NYS2d 43 [1st Dept 1999]).

In determining the merits of a motion to dismiss pursuant to CPLR 3211(a)(7), the

Court "must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts alleged fit within any cognizable legal theory" (*Goldman v Metro. Life Ins. Co.*, 5 NY3d 561, 570-71 [2005]).

However, "allegations consisting of bare legal conclusions, as well as factual claims either inherently contradictory or flatly contradicted by documentary evidence, are not presumed to be true and accorded every favorable inference" (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]; *Wilson v Hochberg*, 245 AD2d 116 [1st Dept 1997]; *Kliebert v McKoan*, 228 AD2d 232 [1st Dept 1996]).

In interpreting an insurance policy, "words and phrases are to be understood in their plain, ordinary, and popularly understood sense, rather than in a forced or technical sense" (*Hartford Ins. Co. of the Midwest v Halt*, 223 AD2d 204, 212, 646 NYS 2d 589, 594 [4th Dept 1996]; see also *United States Fid. & Guar. Co. v Annumiata*, 67 NY2d 229, 232, 501 NYS2d 790 [1986] ["Where the provisions of the policy 'are clear and unambiguous, they must be given their plain and ordinary meaning, and the courts should refrain from rewriting the agreement'"]; *State v Capital Mut. Ins. Co.*, 213 AD2d 888, 890, 623 NYS2d 660, 661 [3d Dept 1995]). A court will not strain to find an ambiguity where words have a definite and precise meaning (*Flynn v Timms*, 199 AD2d 873, 874, 606 NYS2d 352, 354 [3d Dept 1993]). It is well settled that where the provisions of an insurance policy "are clear and unambiguous, they must be given their plain and ordinary meaning, and courts should refrain from rewriting the agreement" (*United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232 [1986]). Ambiguities, if any, should be resolved in favor of the insured and against the carrier (*United States Fid. & Guar. Co. v Annunziata, supra*).

The four corners of an insurance agreement govern who is covered and the extent of

coverage (*Sixty Sutton Corp. v Illinois Union Ins. Co.*, 34 AD3d 386, 825 NYS2d 46 [1st Dept 2006] citing *Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27, 33 [1979], *affd* 49 NY2d 924 [1980]). “In addition, where a third party seeks the benefit of coverage, the terms of the contract must clearly evince such intent” (*Id.*), and the party claiming insurance coverage has the burden of proving entitlement (*Moleon v Kreisler Borg Florman General Const. Co., Inc.*, 304 AD2d 337, 758 NYS2d 621 [1st Dept 2003]). A party that is not named an insured or additional insured on the face of the policy is not entitled to coverage (*Moleon, supra*).

At the outset, it cannot be said that Cipriani, as assignee of Indigo, lacks standing to challenge Utica’s disclaimer (*Home Depot U.S.A., Inc. v National Fire & Marine Ins. Co.*, 55 AD3d 671, 866 NYS2d 255 [2d Dept 2008] citing *Quantum Corporate Funding, Ltd. v Westway Indus. Inc.*, 4 NY3d 211 [“Home Depot, as assignee of Westward, was permitted to commence the instant action seeking a determination of coverage issues as they applied to Westward. Under New York law, claims are typically transferable and National Fire has failed to support its contention that such an assignment was prohibited by Insurance Law § 3420”]).

In any event, a review of the submissions indicate that Cipriani is not entitled to coverage under the Utica Policy.

The Utica Policy does not expressly name Cipriani as an insured on the Policy. As to Cipriani’s status as an additional insured under the Policy, the Blanket Additional Insured provision of the Policy provides as follows:

BLANKET ADDITIONAL INSURED

(Contractors)

Item 7.d is added to the ADDITIONAL DEFINITIONS of COMMERCIAL LIABILITY

COVERAGES of the Contractors Special Policy form, AP-100.

7. Insureds also includes:

d. Any person or organization whom you are required to name as an additional insured on this policy under a written contract or agreement.

The Written Contract or written agreement must be:

- (1) Currently in effect or becoming effective during the terms of this policy; and
- (2) Executed prior to the "bodily injury", "property damage", "personal injury", or "advertising injury".

Thus, under the express and unambiguous provision of the Utica Policy, in order for Cipriani to meet the definition as an "additional insured," Cipriani must be an entity with whom Indigo was "required to name as an additional insured" on the Policy "under a written contract or agreement." Thus, an agreement that does not contain such a contractual obligation will not trigger additional insured coverage. In this regard, Indigo's contract with Cipriani contains the following insurance provisions, and states, in pertinent, that:

ARTICLE 16. Insurance

16.1 The Contractor shall purchase from and maintain . . . insurance for protection from claims under workers' compensation acts and other employee benefit acts which are applicable, claims for damages because of bodily injury, including death, and claims for damages, other than to the Work itself, to property which may arise out of or result from the Contractor's operations under the Contact, whether such operations be by the Contractor or by a Subcontractor or anyone directly or indirectly employed by any of them. This insurance . . . shall include contractual liability insurance applicable to the Contractor's obligations. Certificates of Insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work. . . .

16.3.3 *The Owner shall not require the Contractor to include the Owner, Architect or other persons or entities as additional insureds on the Contractor's Liability insurance under Paragraph 16.1. (emphasis added)*

A provision in a construction contract cannot be interpreted as requiring procurement of additional insured coverage unless such a requirement is expressly and specifically stated

(*McCarthy v Turner Constr.*, 2007 WL 2176569 [Stallman, J., Supreme Court New York County citing *Trapani v 10 Arial Way Assoc.*, 301 AD2d 644, 647 [2d Dept 2003]). Contract language that merely requires the purchase of insurance will not be read as also requiring that a contracting party be named as an additional insured (*Deleonardo v Atlantic Casualty Ins. Co.*, 2007 WL 2175859 [Goodman, J., Supreme Court New York County] citing *Trapani v 10 Arial Way Assoc.*, *supra*). It is clear that the Indigo Contract does not require that Indigo name Cipriani as an additional insured on any policy of insurance. In other words, there is no contract requiring that Cipriani be named as an additional insured. Therefore, Cipriani does not fall within the definition of "additional insured" under the Utica Policy (*see ALIB, Inc. v Atlantic Cas. Ins. Co.*, 52 AD3d 419, 861 NYS2d 28 [1st Dept 2008] [holding that plaintiff was not afforded additional insured status under the insurance policy issued by Atlantic to AFA Construction Co., where the written contract entered into between AFA and plaintiff did not require AFA to name plaintiff as an additional insured, as required by the subject policy]; *Trapani* [where subcontractor's policy contained blanket endorsement providing that a "work contract" must require that the purported additional insured be named as an insured under the policy, subcontractor's contract requiring liability and workers' compensation insurance will not be read as also requiring that a contracting party be named as an additional insured, so as to trigger policy coverage]).

Even if Cipriani were deemed an additional insured, the Employee and Contractual Liability Exclusions would bar coverage for the Accident and Underlying Action, which arise out of injuries sustained by Szuba during the course of his employment for Indigo. "To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear

and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case” (*Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 652 [1993]; see also, *Mazzuocolo v Cinelli*, 245 AD2d 245, 247 [1st Dept 1997]). As set forth below, the Policy's Employee and Contractual Liability Exclusions are plain and unambiguous, subject to no other reasonable interpretation, and applies to the undisputed facts of this case.

It is uncontested that Szuba was employed by Indigo at the time of his alleged accident.

The Employee Exclusion contained within the Utica Policy provides, in pertinent part, as follows:

Exclusion of Injury to Employees, Contractors, and Employees of Contractors

This insurance does not apply to:

- (i) bodily injury to any employee of any insured, to any contractor hired or retained by or for any insured or to any employee of such contractor, if such claim for bodily injury arises out of and in the course of his/her employment or retention of such contractor by or for any insured, for which any insured may become liable in any capacity;
- (ii) any obligation of any insured to indemnify or contribute with another because of damage arising out of the bodily injury; or
- (iii) bodily injury sustained by the spouse, child, parent, brother or sister, or of a contractor, or of an employee of a contractor of any insured as a consequence of bodily injury to such employee, contractor, or employee of such contractor, arising out of and in the course of such employment or retention by or for any insured.

This exclusion applies to all claims and suits by any person or organization for damages because of such bodily injury, including damages for care and loss of services.

Similar employee exclusions have been held to be unambiguous as a matter of law (see *Sixty Sutton Corp. v Illinois Union Ins. Co.*, *supra*, [finding unambiguous language which stated that “This insurance does not apply to: “bodily injury to any employee of any insured . . . if such claim for bodily injury arises out of and in the course of his/her employment or retention of such contractor by or for any insured, for which any insured may become liable in any capacity”];

Moleon, supra [holding that Utica properly disclaimed coverage based upon plaintiff's status as an employee of its insured, subcontractor AMG at the time of the accident where Utica's policy stated that it does not provide coverage for "bodily injury to an employee of an insured if it occurs in the course of employment."]'). "New York courts have held that employee exclusionary clauses containing the same or similar language are plain and unambiguous and that such a clause applies to exclude coverage to an additional insured where, as here, the main action is brought against such additional insured by the employee of a named insured (*Moleon v Kreisher Borg Florman, supra*). It is undisputed that Szuba was employed by Utica's insured, Indigo at the time of the Accident. Therefore, the Employee Exclusion expressly precludes coverage for claims raised by Szuba against Indigo, the insured under the Utica Policy.

Contrary to plaintiff's contention, the Employee Exclusion, which has been upheld by the Court (*see supra* p. 17), is not against public policy, and the Minnesota case upon which Cipriani relies for the proposition that the Employee Exclusion herein is against public policy lacks merit, is unpersuasive, and not binding upon this Court (*see Tower Ins. Co. v Judge*, 840 F Supp 679 [D. Minn. 1993][finding that "public policy favors a narrow construction of the criminal act in a homeowners insurance policy]).

Additionally, since all of the claims against Indigo for which Cipriani seeks relief (*i.e.*, the amount contained in the Affidavit of Confession of Judgment), arise out of an alleged contract between Indigo and Cipriani, such claims are also precluded from coverage under the clear and unambiguous language of the Contractual Liability Exclusion, which precludes coverage for "(ii) any obligation of any insured to indemnify or contribute with another because of damage arising out of the bodily injury."

Here, the Indigo Contract required Indigo to indemnify Cipriani

from and against any and all claims, . . . damages, injuries, liabilities, expenses, penalties, judgements, liens, encumbrances, orders and awards, . . . howsoever caused, which directly or indirectly relate to or result wholly or in part from . . . and against claims, damages, losses and expenses, including but not limited to attorneys' fees arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury . . . , but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 8.13.

As indicated by Indigo's Affidavit of Confession and the above indemnification provision, Indigo's liability to Cipriani arises out of Indigo's contractual obligation to indemnify Cipriani for the Accident. Therefore, the Contractual Liability Exclusion also precludes coverage for the claims asserted against Indigo which arise out of contract or agreement, and therefore, precludes Cipriani's claims against Utica herein (*see North River Ins. Co. v. United Nat. Ins. Co.*, 81 NY2d 812 [1993] [rejecting the argument that the term "indemnification" in an exclusion was ambiguous, and holding that the "plain terms of the provision expressly cover the liability United seeks to exclude-an "obligation of the insured to indemnify another"]; *Green Bus Lines, Inc. v Consolidated Mut. Ins. Co.*, 74 AD2d 136, 426 NYS2d 981 [2d Dept 1980]; *State v Schenectady Hardware and Elec. Co., Inc.*, 223 AD2d 783, 636 NYS2d 861 [3d Dept 1996] [where exclusionary language is clear and unambiguous and renders coverage inapplicable to ". . . any obligation of the insured to indemnify another because of damages arising out of such injury," the plain meaning of the exclusion was to relieve the insurer of liability when its insured was sued for indemnity or contribution because of damages arising out of bodily injury to an

employee of the insured suffered during the course of his employment on the initial contract]).

Contrary to plaintiff's contention, the Certificate of Insurance does not raise an issue of fact as to whether Cipriani is entitled to coverage under the Utica Policy for the Accident and Underlying Action. A certificate of insurance purporting to afford a party coverage, which on its face states that it is issued for informational purposes only, cannot by itself establish coverage (*Tribeca Broadway Assocs., LLC v Mount Vernon Fire Ins. Co.*, 5 AD3d 198 [2004]; *Moleon, supra*; *Sixty Sutton Corp.* [the certificate of insurance's reference to the general contractor is insufficient to confer coverage where the insurance policy itself does not cover the company]).

Nor does the indemnity clause in Indigo's contract with Cipriani create coverage under the Utica Policy in favor of Cipriani.

Finally, the exclusionary provisions such as the Employee Exclusion at issue herein have been upheld to negate coverage under similar circumstances, and Cipriani's claims regarding the Insurance Department's approval of the Exclusions at issue are insufficient to raise an issue of fact. It has been held that the failure of plaintiff to file an endorsement with the Insurance Department for approval "does not, by itself, void the policy clause, but rather carries its own penalties for non-filing. Further, such clause is void only if the substantive provisions of the clause are inconsistent with other statutes or regulations" (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Ambassador Group*, 157 AD2d 293, 556 NYS2d 549 [1st Dept 1990]). Here, there is no showing that the Exclusions are inconsistent with other statutes or regulations.

Nor is there any indication that additional discovery would raise an issue as to Utica's liability under the Policy.

Thus, based on documentary evidence consisting of the Utica Policy, the pleadings in the Underlying Action, and uncontested facts before the Court, Utica established entitlement to dismissal of the Complaint and all cross-claims asserted against it, and a declaration pursuant to CPLR §3001, that Utica has no obligation to defend or indemnify any party, including plaintiff Cipriani or Indigo in connection with the Underlying Lawsuit and the third-party action filed against Indigo.

Conclusion

Based on the foregoing, it is hereby

ORDERED that Utica's motion pursuant to CPLR 3211(a)(1) & (7), and CPLR 3211(c) for an order dismissing the Complaint and all cross-claims asserted against it, and declaring, pursuant to CPLR §3001, that Utica has no obligation to defend or indemnify any party, including plaintiff Cipriani or Indigo in connection with the Underlying Lawsuit and the third-party action filed against Indigo, is granted pursuant to CPLR 3211(a)(1). And it is further

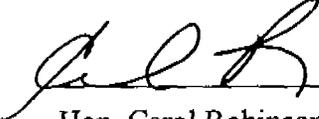
ORDERED that the Clerk may enter judgment accordingly. And it is further

ORDERED that the remaining parties appear for a Preliminary Conference on October 13, 2009, 2:15 p.m. And it is further

ORDERED that Utica serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: August 17, 2009


Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

