SHORT FORM ORDER

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INDEX
NO.: 7042-01

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 8 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 5-16-05; 7-20-05
SUBMITTED: 8-17-05
MOTION NO: 003-MOT D
004-MD
005-XMOT D

CONNECTICUT INDEMNITY COMPANY,

Plaintiff,

-against-

LIVON HINES, DAVID P. MCCARTHY, INC., NEW JERSEY MANUFACTURERS INSURANCE COMPANY and MICHAEL MALDONADO, MICHELE A. SCRIBER, NICOLE SCRIBER, an infant by her father and natural guardian, and PROGRESSIVE INSURANCE COMPANY,

Defendants.

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Upon the following papers numbered 1 to 60 read on this motion and cross-motion for summary judgment; Notice of Motion and supporting papers 1-23; 24-43; Notice of Cross Motion and supporting papers 44-54; Answering Affidavits and supporting papers___; Replying Affidavits and supporting papers 57-58; 59-60; it is,

ORDERED that the motion by defendants David P. McCarthy, Inc., and New Jersey Manufacturers Insurance Company for an order pursuant to CPLR 3212 granting summary judgment in their favor; dismissing plaintiff's first, fourth, and sixth causes of action; and declaring (I) that policy endorsement CA2309 of the non-trucking automobile liability policy issued by the plaintiff, entitled "Truckers–Insurance for Non-Trucking Use," is void as against New York public

policy, (ii) that plaintiff's policy must, in the absence of the voided endorsement, provide coverage for claims arising from a February 2, 2001, motor vehicle accident involving defendant Livon Hines, (iii) that because policy endorsement CA2309 is void, plaintiff cannot limit its liability to the statutory minimum by separate endorsement, and (iv) that plaintiff must provide coverage for any claims arising from the accident on a pro rata basis with the truckers policy issued by New Jersey Manufacturers Insurance Company up to the $500,000 limit of plaintiff's policy; the motion (incorrectly denominated as a cross motion) by defendants Michele A. Scriber, Nicole Scriber, and Progressive Insurance Company for an order pursuant to CPLR 3212 granting summary judgment, *inter alia*, declaring that the insurance coverage provided by Progressive Insurance Company will not be triggered in this matter; and the cross motion by plaintiff for an order granting summary judgment in its favor declaring (I) that plaintiff has no responsibility for any claims arising from a February 2, 2001, motor vehicle accident involving defendant Livon Hines, or (ii) that any coverage for which plaintiff may be held liable is limited to the minimum New Jersey State insurance requirements of $15,000 per person and $30,000 per occurrence, or (iii) that any coverage for which plaintiff may be held liable is limited to minimum New York State insurance requirements of $25,000 per person and $50,000 per occurrence, or (iv) that plaintiff's coverage is limited to its one-third pro rata share relative to the truckers policy issued by New Jersey Manufacturers Insurance Company based upon each policy's liability limits of $500,000 and $1,000,000, respectively, are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendants David P. McCarthy, Inc. and New Jersey Manufacturers Insurance Company is granted to the extent indicated below, and the motion is otherwise denied; and it is further

ORDERED that the motion by defendants Michele A. Scriber, Nicole Scriber, and Progressive Insurance Company is denied as academic, the motion having been withdrawn by stipulation dated July 1, 2005; and it is further

ORDERED that the cross motion by plaintiff is granted to the extent indicated below, and the motion is otherwise denied.

This dispute arises from a motor vehicle accident which took place on Interstate 87 in Cornwall, New York, at approximately 12:50 p.m. on February 2, 2001. The accident occurred when a 1993 Freightliner tractor, owned and operated by defendant Livon Hines, a New York resident, allegedly struck a parked vehicle occupied by defendants Michael Maldonado, Michele A. Scriber, and Nicole Scriber.[1] At the time of the accident, the tractor was pulling a chassis and container in furtherance of the business operations of defendant David P. McCarthy, Inc. ("McCarthy"), a common carrier with offices in Port Kearny, New Jersey. The chassis had been loaded with the container earlier that day in Port Newark, New Jersey. The accident occurred when Hines was en route to deliver the contents of the container to Newburgh, New York.

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[1] These defendants subsequently commenced the underlying personal injury action against Livon Hines and David P. McCarthy, Inc., *et al.*, in Supreme Court, Bronx County (Index No. 01-18325).

Prior to the accident, on or about January 12, 2001, Hines and McCarthy had entered into an "Owner Operator Service Contract" ("the Contract") pursuant to which Hines agreed to lease his equipment and driving services as an agent of McCarthy for a period of one year. The Contract provided, in part, that it was "made and entered into" in South Kearny, New Jersey and that it was to be interpreted under the laws of the State of New Jersey.

In effect on the date of the accident (in accordance with the Contract) was a non-trucking automobile liability (NTAL) policy issued by the plaintiff designating Hines as the named insured and McCarthy as the certified carrier. The policy provided $500,000 of liability coverage for bodily injury and property damage. Pursuant to the policy's Business Auto Coverage Form declarations page and policy endorsement #3 (Form No. 32520-0), the covered "autos" for which liability coverage was provided included the subject tractor and any attached trailer. However, according to policy endorsement CA2309, entitled "Truckers–Insurance for Non-Trucking Use," the insurance was not to apply "to a covered 'auto' while used to carry property in any business" or "while used in the business of anyone to whom the 'auto' is rented." The policy also contained the following amendment to the non-trucking use endorsement, designated as policy endorsement #2 (Form No. 32519-0):

> We agree with YOU that if any of the provisions of the endorsement, "Truckers Insurance for Non-Trucking Use" CA2309 are held to be void or unenforceable under the law of any jurisdiction, for reasons of public policy, violation of statute, or otherwise, WE will not pay any sums in excess of the minimum amounts required by the Financial Responsibility Laws of such jurisdiction, and then only after all valid and collectible insurance available to the Named Insured, or which would be available to the Named Insured in the absence of this policy, has been exhausted.

Section IV(B)(5) of the policy's Business Auto Coverage Form, the "other insurance" clause, provided as follows:

> 5. OTHER INSURANCE
>
> a. For any covered "auto" you own, this Coverage Form provides primary insurance. For any covered "auto" you don't own, the insurance provided by this Coverage Form is excess over any other collectible insurance. However, while a covered "auto" which is a "trailer" is connected to another vehicle, the Liability Coverage this Coverage Form provides for the "trailer" is:
>
> (1) Excess while it is connected to a motor vehicle you do not own.
>
> (2) Primary while it is connected to a covered "auto" you own.

* * *

d. When this Coverage Form and any other Coverage Form or policy covers on the same basis, either excess or primary, we will pay only our share. Our share is the proportion that the Limit of Insurance of our Coverage Form bears to the total of the limits of all the Coverage Forms and policies covering on the same basis.

Policy endorsement #4 (Form No. 32521-0) further provided that the term "named insured" was to apply "only to those persons or organizations that have leased autos with operator to the certified carrier designated on the certificate under a valid, long term lease agreement," that the term "covered autos" was to apply "only to those autos scheduled and designated in the certificate of insurance * * * for which at the time of loss, there is a valid, long term lease existing with the designated certified carrier covering that auto," and that the term "long term lease" referred to "a written lease of not less that thirty (30) consecutive days duration." It is undisputed that the Contract qualified as a "long term lease" under the NTAL policy.

Also in effect on the date of the accident (also in accordance with the Contract) was a truckers policy issued by defendant New Jersey Manufacturers Insurance Company (NJM), designating McCarthy as the named insured and providing $1 million of liability coverage. It is undisputed that the tractor-trailer operated by Hines is a "covered auto" under the truckers policy. Section IV(B)(5) of the Truckers Coverage Form provided as follows:

5. OTHER INSURANCE–PRIMARY AND EXCESS INSURANCE PROVISIONS

a. This Coverage Form's Liability Coverage is primary for any covered auto while hired or borrowed by you and used exclusively in your business as a trucker and pursuant to operating rights granted to you by a public authority. This Coverage Form's Liability Coverage is excess over any other collectible insurance for any covered auto while hired or borrowed from you by another trucker. However, while a covered auto which is a trailer is connected to a power unit, this Coverage Form's Liability Coverage is:

(1) On the same basis, primary or excess, as for the power unit if the power unit is a covered auto.

(2) Excess if the power unit is not a covered auto.

b. Any Trailer Interchange Company provided by this Coverage Form is primary for any covered auto.

c. Except as provided in paragraphs a. and b. above, this Coverage Form provides primary insurance for any covered auto you own and excess insurance for any covered auto you don't own.

d. Regardless of the provisions of paragraphs a., b., and c. above, this Coverage Form's Liability Coverage is primary for any liability assumed under an insured contract.

e. When this Coverage Form and any other Coverage Form or policy covers on the same basis, either excess or primary, we will pay only our share. Our share is the proportion that the Limit of Insurance of our Coverage Form bears to the total of the limits of all the Coverage Forms and policies covering on the same basis.

The truckers policy also contained the Endorsement for Motor Carrier Policies of Insurance for Public Liability under Sections 29 and 30 of the Motor Carrier Act of 1980 ("the MCS-90 endorsement"), which implements a federal requirement effectively imposing a suretyship obligation on the insurer where no coverage exists under the policy to which the endorsement is attached.

It appears that Hines submitted a notice of claim with respect to the accident to the plaintiff on or about February 5, 2001. By letter dated February 14, 2001, the plaintiff disclaimed coverage for all claims arising from the accident. This action followed. The plaintiff seeks a judgment, *inter alia*, declaring (I) that McCarthy and NJM are obligated to defend and indemnify Hines in connection with any claim arising from the accident, to the exclusion of the plaintiff, based on the fact that a long-term lease was in effect between Hines and McCarthy and that Hines was hauling a container in the course of McCarthy's business at the time of the accident, (ii) that the truckers policy affords coverage with respect to the accident to the exclusion of the NTAL policy, (iii) that, if Hines was under lease to McCarthy at the time of the accident, NJM is obligated to defend and indemnify Hines in connection with any claim arising from the accident, (iv) that the plaintiff is not obligated to defend and indemnify Hines in connection with any claim arising from the accident, (v) that, if the lease between Hines and McCarthy is deemed cancelled or terminated, the NTAL policy is void *ab initio*, and (vi) that, if the Court finds that the NTAL policy affords coverage with respect to the accident, the plaintiff's responsibility should be limited to $25,000/$50,000, the minimum amount required by the financial responsibility laws of New York State, and it should be considered excess to any coverage owed by NJM. Discovery is now complete and a note of issue was filed on June 8, 2005.

Defendants McCarthy and NJM move for summary judgment, *inter alia*, declaring (I) that the non-trucking use endorsement contained in the plaintiff's policy is void as against New York public policy, (ii) that the plaintiff's policy must, therefore, provide coverage in accordance with the policy provisions in the absence of the voided endorsement, (iii) that, because the non-trucking use endorsement is void, the plaintiff cannot limit its liability to the statutory minimum by separate endorsement, and (iv) that the plaintiff must provide coverage for any claims arising from the accident on a pro rata basis with the NJM policy up to the $500,000 limit of the plaintiff's policy. The defendants McCarthy and NJM contend, in part, that the non-trucking use endorsement is void in accordance with section 388 of the Vehicle and Traffic Law and the Court of Appeals opinion in ***Royal Indem. Co. v Providence Washington Ins. Co.*** (92 NY2d 653), because the

policy did not specifically require McCarthy, as the vehicle's lessee, to obtain the coverage required under New York law, notwithstanding that McCarthy was required under Federal law to obtain such coverage and, in fact, did so. As a consequence, the defendants McCarthy and NJM claim that policy endorsement #2 is likewise void, since an insurer cannot limit its liability by separate endorsement if the underlying exclusion is prohibited. The defendants McCarthy and NJM further contend that, since the language of the competing policies indicate that they provide coverage on the same basis and that the coverage provided by the plaintiff is primary, the plaintiff is required to provide coverage for any claims arising from the accident on a pro rata basis. In a related vein, the defendants McCarthy and NJM argue that the MCS-90 endorsement contained in the truckers policy does not render that policy primary between it and the NTAL policy since the purpose of the MCS-90 endorsement is only to provide financial recourse to an injured party when other coverage is lacking and that its terms, therefore, are not generally relevant to disputes between insurance carriers.

The plaintiff cross-moves for summary judgment declaring that it has no responsibility for any claims arising from the accident, but that, if it does, any coverage for which it may be held liable is limited to the minimum New Jersey State insurance requirements of $15,000 per person and $30,000 per occurrence, or the minimum New York State insurance requirements of $25,000 per person and $50,000 per occurrence, or its one-third pro rata share relative to the truckers policy issued by NJM based upon each policy's liability limits of $500,000 and $1,000,000, respectively. The plaintiff argues that, because New Jersey has significant contacts with this dispute, New Jersey law should apply and that, under New Jersey law, the non-trucking use endorsement is not void as against public policy and policy endorsement #2 is a valid means of limiting coverage. Even applying New York law, the plaintiff contends that policy endorsement #2 is valid and enforceable and that its coverage is limited to the minimums required by New York State's financial responsibility laws. Finally, even if policy endorsement #2 is not enforceable, the plaintiff claims that its coverage is limited to its one-third pro rata share by operation of the "other insurance" clause in its policy.

Preliminarily, the Court notes that, although the plaintiff did not submit a copy of the pleadings in support of its cross motion, the pleadings were filed in connection with the motion-in-chief. Therefore, the plaintiff's failure to comply with CPLR 3212(b) does not warrant entry of an order denying the cross motion (*see*, ***Welch v Hauck***, 18 AD3d 1096).

As to the choice of law, the Court finds that New York law governs in this action. Assuming, for purposes of this analysis, the existence of an actual conflict between the laws of New York and New Jersey (*cf.*, ***Matter of Allstate Ins. Co. [Stolarz]***, 81 NY2d 219),[2] it is evident

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[2] Whether such a conflict exists is debatable. Under New York law, it is clear that the non-trucking use endorsement is against public policy as expressed in Vehicle and Traffic Law § 388 and Insurance Law § 3420(e), which require the existence of insurance to meet the minimum standards of liability coverage in order to assure that a person injured by the negligent operation of a motor vehicle has recourse against a financially responsible defendant, because it creates a potential gap in coverage.

that the New Jersey contacts asserted by the plaintiff, which arise solely from the relationship between Hines and McCarthy, have little or no bearing on the action and that New York has the more significant contacts and the greater interest in the litigation. "In general, significant contacts in a case involving contracts, in addition to the place of contracting, are the place of negotiation and performance, the location of the subject matter of the contract, and the domicile or place of business of the contracting parties" (***Matter of Eagle Ins. Co. v Singletary***, 279 AD2d 56, 59; *accord*, ***Matter of Allstate Ins. Co. [Stolarz]***, *supra*). Here, the contract at the heart of the parties' dispute is an insurance policy issued by the plaintiff, a company authorized to do business in New York, to Hines, a New York resident, and the subject matter of the contract, a tractor, does not have a fixed location, but is registered in New York. Although it does not appear on this record where the policy was negotiated or issued, the remaining factors clearly point to the application of New York law. Moreover, certain instances, "the policies underlying conflicting laws in a contract dispute are readily identifiable and reflect strong governmental interests, and therefore should be considered" (*id.*, at 226). Here, consideration of such interests supports the choice of New York law. The New York courts have uniformly recognized that when, as here, a non-trucking use endorsement does not by its terms require the lessee to obtain other insurance coverage, it contravenes the strong public policy embodied in Vehicle and Traffic Law § 388 and Insurance Law § 3420(e) that a person injured by the negligent operation of a motor vehicle have recourse to a financially responsible defendant (*see*, ***Royal Indem. Co. v Providence Washington Ins. Co.***, *supra*; ***Randazzo v Cunningham***, *supra*; *see also*, ***Connecticut Indem. Co. v 21st Century Transp.***

Since the endorsement does not, by its terms, require the vehicle's lessee to obtain such insurance, it is void and unenforceable under New York law, irrespective of whether the lessee actually obtained the insurance (*see*, ***Royal Indem. Co. v Providence Washington Ins. Co.***, *supra*; ***Randazzo v Cunningham***, 56 AD2d 702, *affd* 43 NY2d 937). The law in New Jersey is far less clear. This Court is aware of only two opinions issued by New Jersey state courts in which the question of whether the non-trucking use exclusion violates public policy was raised. Both times, the New Jersey appellate court expressly declined to resolve the question (***Moore v Nayer***, 321 NJ Super 419, 729 A2d 449, *appeal dismissed* 164 NJ 187, 752 A2d 1289; ***Casey v Selected Risks Ins. Co.***, 176 NJ Super 22, 422 A2d 83). Moreover, while the plaintiff cites two unreported federal court decisions in which it was held that the endorsement did not violate New Jersey's public policy, neither is ultimately persuasive as to the current state of New Jersey law. In one, the court so held without having engaged in any analysis of New Jersey law and without having made any effort to determine how New Jersey's highest court would decide the issue (***Connecticut Indem. Co. v Government Empls. Ins. Co.***, US Dist Ct, NJ, Dec. 16, 1997, Barry, J., 97 Civ 732). The other (***Zimmerman v Connecticut Indem. Co.***, US Dist Ct, Conn, July 1, 1999, Hall, J., 97 Civ 1145) rests its conclusion on two New Jersey cases in which the issue of public policy was never raised (***Planet Ins. Co. v Anglo Am. Ins. Co.***, 312 NJ Super 233, 711 A2d 899; ***Nationwide Ins. Co. v DoCompo***, 168 NJ Super 561, 403 A2d 948) and a third in which it was raised but (expressly) never resolved (***Casey v Selected Risks Ins. Co.***, *supra*). At best, it may be said that New Jersey law is unsettled on the point. The burden is on the plaintiff to establish proof of a conflict, absent which the law of the forum state, i.e., New York, controls (*see*, ***Portanova v Trump Taj Mahal Assoc.***, 270 AD2d 757, *lv denied* 95 NY2d 765; ***Brandstetter v USAA Cas. Ins. Co.***, 163 AD2d 349, *lv dismissed in part, denied in part* 78 NY2d 1027).

Co., 186 F Supp 2d 264 [ED NY]; ***R.E. Turner, Inc. v Connecticut Indem. Co.***, 925 F Supp 139 [WD NY). New Jersey, by contrast, has expressed no such policy (*see*, n 2, *supra*) and has no governmental interest in applying its law to this dispute (*see generally*, ***Zurich Ins. Co. v Shearson Lehman Hutton***, 84 NY2d 309).

Applying New York law, and having already noted that the non-trucking use endorsement is void and unenforceable as against New York public policy (*see*, n 2, *supra*), the Court finds that policy endorsement #2, which seeks to limit the plaintiff's liability to the minimum statutory amounts in the event that the non-trucking use endorsement is held invalid, is valid and enforceable. So long as the purchaser of an insurance policy is not misled to believe that the policy provides coverage which it does not, and the policy affords the minimum coverage prescribed by this State's financial responsibility laws, the Court perceives no reason to declare a violation of public policy (*cf.*, ***Morris v Snappy Car Rental***, 84 NY2d 21). Indeed, in ***Royal Indem. Co. v Providence Washington Ins. Co.*** (*supra)*, the Court of Appeals noted that, if a policy "does not contain a term stating that coverage is limited to the statutory minima [and] if a non-trucking-use exclusion is found to be invalid, no such limitation will be read into the policy" (*id.*, at 659), the implication being that a policy which *does* contain such a term making its coverage applicable to the extent of the statutory minimums will *not* be found to violate public policy. While the Court recognizes that similar endorsements were denied effect in ***R.E. Turner, Inc. v Connecticut Indem. Co.***, (*supra*) and ***Planet Ins. Co. v Gunther*** (160 Misc 2d 67), neither of those cases is authoritative. Moreover, those cases refer to ***Matter of Liberty Mut. Ins. Co. [Hogan]*** (82 NY2d 57) and ***Rosado v Eveready Ins. Co.*** (34 NY2d 43), neither of which addressed the effect of a saving clause such as is found here.

Upon review of the "other insurance" clauses contained in the respective policies, the Court finds that each policy provides primary coverage of the risk and that each insurer must contribute in the proportion that its limit of insurance bears to the total limit. For purposes of computing the plaintiff's share, the Court notes that, pursuant to section IV(B)(5)(d) of the NTAL policy, its "limit" is not the statutory minimum, but rather the $500,000 limit of liability stated on the policy's declarations page. Therefore, the plaintiff's share is one-third based on the total liability limit of $1.5 million.

Accordingly, the Court directs the entry of a judgment declaring:

1. That policy endorsement CA2309 of the non-trucking automobile liability policy issued by the plaintiff, entitled "Truckers–Insurance for Non-Trucking Use," is void as against New York public policy; and

2. That the NTAL policy must, in the absence of the voided endorsement, provide coverage for claims arising from the February 2, 2001, motor vehicle accident involving defendant Livon Hines; but

3. That any coverage for which the plaintiff may be held liable is limited to the minimum New York State insurance requirements of $25,000 per person and $50,000 per

occurrence; and

4. That the plaintiff's share of any loss is one-third and that the plaintiff's one-third share shall not be more than the New York State statutory minimum.

To the extent the defendants move for summary judgment dismissing the plaintiff's first, fourth, and sixth causes of action, the Court notes that it is error to dismiss the complaint in an action for declaratory relief if the plaintiff is not entitled to the declaration sought. In lieu of dismissal, the Court has declared the rights of the parties (*see*, ***Lanza v Wagner***, 11 NY2d 317, *appeal dismissed* 371 US 74, *cert denied* 371 US 901).

The Court directs that the remaining claims be severed and continued.

ELIZABETH H. EMERSON

DATED: November 16 , 2005

J. S.C.