

**Liberty Insurance Underwriters, Inc. v United States  
Liability Insurance Co.**

2006 NY Slip Op 30267(U)

September 27, 2006

Supreme Court, New York County

Docket Number:

Judge: Karen Smith

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

PRESENT: **KAREN SMITH**  
Index Number : 600126/2005

PART 44

LIBERTY INSURANCE UNDERWRITERS  
vs  
UNITED STATES LIABILITY  
Sequence Number : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion ~~to~~ for Summary judgment

2 memorandum  
Notice of Motion/~~Order to Show Cause~~ - Affidavits - Exhibits ...  
Notice of Cross-Motion ~~...~~  
Answering Affidavits ~~...~~ memorandum of Defendant  
Opposition ~~...~~ memorandum of Plaintiff  
Replying Affidavits 2 memorandum of Defendant  
exhibits

PAPERS NUMBERED	
1	_____
2	_____
3	_____
4	_____
5	_____
6	_____

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

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion and cross-motion are decided  
in accordance with the attached memorandum decision  
and order.

**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 County Clerk's Desk (Room  
41B).

Dated: 9/27/06

KSS  
**KAREN SMITH** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 44

-----X  
LIBERTY INSURANCE UNDERWRITERS, INC.,

Plaintiff,  
-against-

Index no.: 600126/05  
Motion seq.: 001  
Motion date: July 18, 2006

UNITED STATES LIABILITY INSURANCE  
COMPANY,

Defendants.

**DECISION AND ORDER**

**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 County Clerk's Department (11B).  
-----X

**PRESENT: KAREN S. SMITH, J.S.C.:**

Plaintiff Liberty Insurance Underwriters, Inc.'s ("LIU") motion for summary judgment declaring that defendant must share costs in providing a defense to a mutual insured is granted and defendant United States Liability Insurance Company's ("USL") motion for summary judgment dismissing the complaint if denied for the reasons set forth more fully below.

Plaintiff filed this declaratory judgment action seeking judgment declaring 1) that LIU is entitled to contribution from USL for the defense costs incurred and to be incurred on behalf of their mutual insured, Howard Dreises ("Dreises"), in connection with a proceeding pending in the Surrogate's Court of the State of New York, County of Kings, entitled *Accounting of Lydia G. Oliveira, as Executrix of the Estate of Urbana Obelencio, a/k/a Urbana Barbosa*, File No. 76/99 (the "Obelencio proceeding"); and 2) that such contribution should be pro rata, based on the parties' respective percentage of Dreises' total coverage under the two insurance policies.

USL answered with various affirmative defenses and counterclaims seeking declaratory judgment that it is not liable to contribute to Dreises' defense because 1) the damages alleged in

the Petition are not covered by its policy; 2) that there is no basis under its policy for cost-sharing as sought by LIU; 3) that LIU has waived its right to contribution from USL; and 4) that the policy excludes damages arising from acts or omissions in the context of Dreises' role as an attorney. LIU now seeks summary judgment ordering that USL is obligated to contribute to Dreises' defense at a rate of 80% of the total cost. USL cross-moves for summary judgment seeking to dismiss LIU's complaint in its entirety and an order declaring that there is no covered event under USL's insurance policy triggering its obligation to defend Dreises.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1987]). Once the movant has made such a showing, the burden then shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

In support of its motion, LIU submitted its New York Lawyers Professional Liability Policy issued to Dreises on April 25, 2003; USL's Real Estate Agents Errors and Omissions Liability Coverage Policy, issued March 13, 2003; a letter from LIU to Dreises dated November 4, 2003, including an Acord General Liability Notice of Occurrence/Claim and a Judicial Subpoena *Duces Tecum*; a letter from USL to Dreises dated November 17, 2003; a letter from Jeffrey Kleiner of Kaufman, Borgeest & Ryan LLP to LIU dated November 19, 2003; a letter from LIU to Dreises dated December 3, 2003; the Supplemental Petition filed in the Obelencio proceeding dated July 6, 2004; a letter from Morstan General Agency Inc. to USL dated July 15, 2004 including an Acord Property Loss Notice; a letter from USL to Dreises dated July 20, 2004;

a letter from Hillary Kahan of O'Connor, Redd, Gollihue & Sklarin LLP, to the Surrogate's Court of the State of New York dated August 18, 2004; a letter from Jeffrey Kleiner of Kaufman, Borgeest & Ryan LLP to LIU dated August 27, 2004; a letter from Jeffrey Steinberg of Steinberg & Cavaliere LLP to USL dated September 28, 2004; a letter from Dreises to LIU dated October 14, 2004; and a letter from Jeffrey Steinberg of Steinberg & Cavaliere LLP to USL dated October 18, 2004.

In opposition to LIU's motion and in support of its cross-motion for summary judgment, USL submitted an affidavit of David C. Guyer, a claims examiner for USL, dated June 13, 2006; USL's Real Estate Agents Errors and Omissions Liability Coverage Policy, issued to Dreises March 13, 2003; portions of an EBT of Morris Weintraub, counsel for Lydia Oliveira, dated March 4, 2005; a Disclosure Statement drafted by Dreises and signed by Oliveira; an affidavit of David C. Guyer dated July 14, 2006; a letter from USL to Dreises dated July 20, 2004; a letter from Dreises to LIU dated October 14, 2004; and portions of the EBT of Oliveira dated March 21, 2005.

The relevant facts are contained in the parties' moving papers and are not in serious dispute. Plaintiff LIU issued a New York Lawyers Professional Liability Policy to Dreises, an attorney, on April 25, 2003 which obligates it to appoint legal counsel to defend Dreises in certain actions covered by the insurance policy involving claims against Dreises in his capacity as an attorney. Defendant USL issued a Real Estate Agents Errors and Omissions Liability Coverage Policy to Dreises, also a real estate agent, on March 13, 2003, which provides that USL will appoint legal counsel to defend Dreises in certain actions covered by its insurance policy involving claims against Dreises in his capacity as a real estate broker.

Dreises was served with a subpoena *duces tecum* by counsel for the Estate of Urbana Obelencio, a/k/a Urbana Barbosa (“the Estate”), dated October 29, 2003 and ordered to appear for an EBT on December 16, 2003. Dreises reported the subpoena to both USL and LIU.

On July 6, 2004, Lydia G. Oliveira (“Oliveira”), the executrix of the Estate, filed a supplemental petition in Surrogate’s Court of Kings County (the “Petition”) seeking the issuance of a citation against Dreises for alleged misconduct both in his capacity as an attorney and as a real estate broker hired to represent the Estate in the sale of residential property. In the Petition, Oliveira alleges that Dreises 1) caused the property to be sold at a greatly undervalued price;<sup>1</sup> 2) was interested and motivated only to seek a real estate commission for himself; 3) wrongfully participated in and permitted a reduction of the purchase price at closing; 4) wrongfully caused the Estate to pay the purchasers’ attorneys \$3,000; 5) breached his fiduciary duties; 6) engaged in and permitted a condition to exist wherein his loyalties were divided between himself and the client and he was less protective the interests of the Estate than of his own interests; 7) permitted a conflict of interest between himself, the client and the purchaser; 8) diminished his trustworthiness as a real estate broker; 9) breached the New York Disciplinary Rules governing the conduct of lawyers; 10) caused the Estate to be harmed and diminished to the extent of \$133,000 by his misconduct as both a real estate broker and a lawyer.

Dreises promptly notified both USL and LIU about the Petition on or about July 15, 2004, and LIU appointed counsel - Kaufman Borgeest & Ryan LLP - to represent Dreises with respect to the proceeding prior to July 20, 2004. In a letter dated July 20, 2004, USL notified Dreises

---

<sup>1</sup> While the copy of the Petition provided to the court by both LIU and USL is a fax copy and several lines appear to be cut off or unclear, the allegations by Oliveira are legible.

that it had retained the law firm of O'Connor, Redd, Gollihue & Sklarin "to respond to the allegations related to your activities as a real estate broker in this matter," and acknowledged that LIU had already appointed counsel.

On September 28, 2004, LIU's coverage counsel sent a letter to USL communicating Dreises' desire that KB&R continue to act as his defense counsel. In addition, LIU discussed and rejected a proposal made by USL in a previous conversation that LIU pay for all of Dreises' defense costs while USL pays only for the counsel it appointed to monitor the defense of only those claims as relate to Dreises' actions as a real estate broker. Instead, LIU proposed that the firms share equally the cost of defending Dreises and stated that if USL did not consent it would file the instant action seeking to compel USL to pay 80% of the costs. On or about October 18, 2004, LIU's coverage counsel sent another letter to USL stating that LIU had received no response to the September 28 letter and was seeking a response by the end of that week. No evidence was submitted by either party that USL responded to the letter. The instant action was commenced on January 26, 2005.

The facts and circumstances surrounding the Obelencio proceeding are discussed below only to the extent they are relevant to deciding this motion.

### **USL's Defense Obligation**

It is well settled that an insurance company's duty to defend an insured in litigation is broader than its duty to indemnify. (*Automobile Ins. Co. Of Hartford v. Cook*, 7 NY3d 131, 137 [2006]). Thus, an insurer must provide a defense whenever the allegations contained in the complaint "suggest . . . a reasonable possibility of coverage." (*Continental Cas. Co. v. Rapid-American Corp.*, 80 NY2d 640, 648 [1993]). Regardless of how groundless, false or baseless a

claim or suit may be, the insurer must defend the insured against a claim if, liberally construed, it is within the policy. (*Ruder & Finn Inc. v. Seaboard Sur. Co.*, 52 NY2d 663, 670 [1981]).

An insurer may not deny an insured a defense because the “facts outside the four corners of [the] pleadings indicate that the claim [is] not covered.” (*Fitzpatrick v. Am. Honda Motor Co., Inc.*, 78 NY2d 61, 63 [1991]). Rather, the insurer must “provide a defense unless it can ‘demonstrate that the allegations of the complaint cast that pleading solely and entirely within the policy exclusions, and, further, that the allegations, *in toto*, are subject to no other interpretation.’” (*Automobile Ins. Co. Of Hartford v. Cook*, 7 NY3d at 137, quoting *Allstate Ins. Co. v. Mugavero*, 79 NY2d 153, 159 [1992]; see also *26 Adar N.B. Corp. v. Stewart Title Ins. Co.*, 202 AD 370 [1<sup>st</sup> Dept. 1994]). In addition, such policy exclusions should be strictly constructed and narrowly read. (*Ruder & Finn Inc. v. Seaboard Sur. Co.*, 52 NY2d at 311). Where an insurer is found to have a duty to defend its insured, that duty extends to the entire action, not only those which trigger its own policy. (See *Town of Massena v. Healthcare Underwriters Mut. Ins. Co.*, 98 NY2d 435 [2002]).

For LIU to succeed on its motion for summary judgment seeking a declaration that USL is obligated to contribute to Dreises’ defense, it must establish as a matter of law, that there is at least one claim in the Petition filed in the Obelencio proceeding that is covered by USL’s policy. Conversely, to grant USL’s cross-motion for summary judgment, USL must establish that no claims or allegations made in the Petition are arguably within its policy’s coverage.

As a threshold matter, LIU argues that USL’s previous admissions of an obligation to provide a defense estops it from denying that obligation now. It is well settled that where an insurer has undertaken the defense of an action on behalf of an insured with knowledge of the

facts constituting a defense to coverage under the policy, and where the insured is thereby prejudiced, the insurer may be estopped from asserting that its policy does not cover the underlying claim. (*Globe Indemnity Co. v. Franklin Paving Co.*, 77 AD2d 581, 582 [2<sup>nd</sup> Dept. 1980]; see also *Albert J. Schiff Assoc., Inc. v. Flack*, 51 NY2d 692 [1980]). However, it is equally well established that an insurer may, by timely notice to the insured, reserve its right to claim that the policy does not cover the situation at issue, while defending the action. (*O'Dowd v. American Surety Co. of New York*, 3 NY2d 347, 355 [1957]).

In the instant action, USL appears to have at one point assumed its duty to represent Dreises when it appointed counsel to oversee the defense of the claim against Dreises, and further recognized that some of the claims against Dreises were covered by the policy when it wrote to him in its July 20, 2004 letter, “it is noted that the claimant appears to be alleging negligence in your representation of her as a real estate broker and as an attorney.” Although this admission may be evidence of USL’s obligation to defend Dreises, it does not constitute estoppel. (See *Mandel Resnik Kaiser Moskowitz & Greenstein P.C. v. Executive Risk Indem. Inc.*, 2005 WL 1712024, at \*4 [S.D.N.Y.] [insurer’s assessment that it has a duty to defend its insured “is strong evidence of its obligation to do so”]). David C. Guyer, Claims Examiner for USL, notes in his affidavit that USL’s appointed counsel did not participate in the defense or make an appearance in the matter. The extent of USL’s appointed counsel’s involvement with the defense appears to be a letter dated August 18, 2004, written by Hillary Kahan of O’Connor, Redd, Gollihue & Sklarin, LLP, to the Surrogate’s Court seeking an adjournment of the next appearance because she had “only been recently retained” and had not had an opportunity to prepare.

LIU's argument on estoppel fails because 1) LIU admits that USL's appointed counsel was retained only for the purpose of monitoring the defense of claims relating to Dreises' broker activities and did not intend to defend the entire action, and 2) there is no evidence that USL's appointed counsel impacted Dreises' defense in any way.. LIU's counsel continued to provide a defense to Dreises without interruption, and in fact clearly rejected any attempt by USL to appoint counsel to oversee the defense.

USL points out that in its July 20 letter to Dreises, it expressly stated that the letter "should not be construed as a Waiver of any other rights and defenses that this Company may have under the policy with respect to this matter." This clear reservation of rights and defenses compels the Court to conclude that USL is not estopped from defending its obligation to provide Dreises coverage under the terms of the policy.

USL now argues that there is no coverage under its policy for the underlying action at all, claiming that it arises solely out of Dreises' work as an attorney rather than as a real estate broker, which would be expressly disclaimed by Exclusion 14 under the policy. LIU, however, points to several allegations in the Petition which it claims is covered by USL's policy. Examining the Petition, the Court finds that there are claims in the Obelencio action which trigger USL's obligation to defend Dreises.

First, the Petition asserts that "[b]oth for the real estate contracts of sale and the closing held September 2002, Mr. Dreises acted both as a real estate broker and as a lawyer for the seller (the Estate) in [the] transaction." More specifically, the Petition alleges

- h) [Mr. Dreises'] conduct herein diminished his "trustworthiness" as a licensed real estate broker under the Real Property Law;

...

- j) that the misconduct of Mr. Dreises herein, both as a licensed real estate broker and a lawyer, caused the Estate to be harmed and diminished to the extent of \$133,000.

It is therefore clear from the “four corners” of the Petition that petitioner is alleging misconduct and harm arising from Dreises’ actions as both an attorney and a real estate broker, and thus USL’s attempt to disclaim the underlying action entirely must fail. Similarly, USL’s attempt to disclaim a duty to defend Dreises by pointing to the policy’s exclusion for claims based upon or involving a breach of fiduciary duty is unavailing. There is only one allegation in the Petition that Dreises breached a fiduciary duty, the Petition does not specify whether the breach was in his duties as an attorney or a real estate broker or both, and other claims appear to allege negligence in his actions as a broker. As the law requires only one allegation in the Petition to be arguably covered by the policy in order to trigger the insurer’s duty to provide a defense, USL has failed to meet its burden on this point.

Next, USL points to certain exclusions for damages. Section IV of the policy provides:

With respect to such insurance as is afforded by this Policy the Company shall:

- A. have the right and duty to defend any Claim against the Insured seeking Damages to which this insurance applies even if any of the allegations of the Claim are groundless, false or fraudulent;

Section VII of the policy defines “Damages” as follows:

- C. “Damages” means compensatory judgment, settlements or awards, but does not include punitive or exemplary Damages, fines or penalties, the return of fees or

other consideration paid to the Insured. . . .

That section also disclaims USL's duty to defend "disputes involving an Insured's fee or charges."

To the extent that the underlying action seeks a return of the \$30,000 broker's fee paid to Dreises, USL may be correct in its assertion that the claim would not be covered by its policy. However, as LIU correctly points out, the issue in this action seeking shared costs in Dreises' defense of the Petition is whether there are *any* allegations in the Petition and damages sought that would trigger USL's duty to defend its insured. While the broker's fee standing alone may have relieved USL of its duty, the Petition is also seeking compensatory damages in the amount of \$100,000. It is explicit in USL's policy that compensatory damages are covered; in fact, the policy states that USL has a *duty* to defend the insured against such a claim, "*even if any of the allegations of the Claim are groundless, false or fraudulent.*" (Emphasis added).

However, USL argues that the claim for \$100,000 in compensatory damages arises from Dreises' alleged reduction in the purchase price at the sale closing. A real estate broker's duties, according to USL, do not extend to the closing and therefore this claim for damages cannot, by law, be attributed to Dreises' actions as a real estate broker. LIU denies this argument and further argues that even if it were factually established when Dreises' duties as a broker were fulfilled, that the allegations in the Petition itself still give rise to USL's duty to defend Dreises.

A real estate broker's duties will be generally satisfied upon producing a "buyer who is ready, willing and able to purchase at the terms set by the seller." (*Mecox Realty Corp. v. Rose*, 202 AD2d 404 [1994]; *see also Donnelly v. Margolis*, 265 AD2d 523 [1999]). However, as USL acknowledges, the parties may contract to require additional duties be performed by the broker

before the commission is fully earned. (*See Mecox Realty Corp. v. Rose*, 202 AD2d at 404 [“The broker’s right to [the] commission is not dependant upon performance of the real estate contract unless there is an agreement to the contrary.”]). Here, USL submitted a disclosure statement drawn up and signed by Dreises, and also signed by the executrix Oliveira, acknowledging that Dreises and Oliveira had discussed his dual role as both attorney and broker. In addition, it states that “the fee [is] the customary 6% brokerage commission upon *sale of the property*,” and that Dreises’ fee for acting as attorney at the closing was waived. (Emphasis added). In light of this evidence, it appears that finalization of the sale was, in fact, the completion of Dreises’ duties as a broker, and not the procurement of a buyer as USL asserts.

However, we need not - and do not - decide this issue here. Issues of fact - such as when Dreises’ duties as a broker were completed - are not appropriately decided upon a motion for summary judgment, and in any event, this issue of fact is one to be decided by the Surrogate’s Court in the underlying proceedings. On the face of the Petition, the allegations are unambiguous that the wrongful conduct occurred in Dreises’ capacity as both broker and attorney, which is sufficient to bring the claim under USL’s policy and thereby trigger its duty to provide a defense.

Finally, USL argues that even if there is a claim in the underlying action which would trigger its policy, LIU’s motion for summary judgment is premature. USL points to a Court of Appeals decision which held, “When more than one policy is triggered by a claim, pro rata sharing of defense costs may be ordered, but we perceive no error or unfairness in declining to order such sharing, with the understanding that the insurer may later obtain contribution from other applicable policies.” (*Continental Cas. Co. v. Rapid-American Corp.*, 80 NY2d at 655-6).

While the Court *may* defer such an order, unlike in *Continental*, postponing a decision on contribution in this case would be fundamentally unfair. LIU's policy provides \$250,000 in coverage, while USL's policy is \$1,000,000. Additionally, USL's argument that decision on the law is premature in the case, is belied by the filing its own cross-motion for summary judgment.

#### **Allocation of Defense Costs**

LIU argues that if USL has a duty to defend Dreises, it is obligated to bear 80% of the defense costs based on the respective insurer's policy limits, citing *General Motor Acceptance Corp. v. Nationwide Ins. Co.* (4 NY3d 451, 453, 456-8 [2005]). There, the court determined that two insurers with equal policy limits had an obligation to provide their insured with a defense, and ordered that the defense costs be equally divided between them. The court rejected the proposition that the costs should be evenly split between the two insurer as a matter of law; rather, the court wrote that it was ordering that the insurers pay "in equal shares as the policy limits of the . . . policies are identical." (*General Motor Acceptance Corp. v. Nationwide Ins. Co.*, 4 NY3d at 456; *see also Continental Cas. Co. v. Rapid-American Corp.*, 80 NY2d at 655 ["When more than one policy is triggered by a claim, pro rata sharing of defense costs may be ordered. . . ."]).

USL provided no contrary case law and did not address LIU's contention in either its memorandum of law in support of its own motion for summary judgment, or its reply memorandum in opposition to LIU's motion for summary judgment. As *General Motor Acceptance Corp.* is good law and no contrary law has been either cited to or found by the Court, it is compelled to agree with LIU. The total coverage between the two insurers is \$1,250,000 (LIU's \$250,000 limit being 20% and USL's \$1,000,000 limit being 80%); as such, the insurers

must share defense costs on a pro rata basis.

The Court finds that plaintiff LIU has satisfied its burden on summary judgment to make a *prima facie* showing of entitlement to judgment as a matter of law. As defendant USL has failed to raise a triable issue of fact in its papers, the Court grant's LIU's motion.

Accordingly, it is;

ORDERED that plaintiff's motion for summary judgment is granted; and it is


ORDERED, ADJUDGED AND DECREED that defendant United States Liability Insurance Company is required to pay its pro rata share, based on the parties' respective insurance policy limits, of the costs to defend the action entitled *Accounting of Lydia G. Oliveira, as Executrix of the Estate of Urbana Obelencio, a/k/a Urbana Barbosa*, File No. 76/99, pending in the Surrogate's Court of the State of New York, County of Kings; and it is

FURTHER ORDERED that defendant's cross-motion for summary judgment dismissing the complaint is denied and defendant's counterclaims and affirmative defenses are dismissed;

The foregoing constitutes the decision and order of this court.

Dated: September 27, 2006  
New York, New York

ENTER:

  
\_\_\_\_\_  
Hon. Karen S. Smith, J.S.C.

**UNFILED JUDGMENT**  
This judgment has not been entered by the Court 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 41B).