

**Fieldston Property Owners Association, Inc. v
Hermitage Insurance Company, Inc.**

2006 NY Slip Op 30541(U)

August 7, 2006

Supreme Court, New York County

Docket Number: 600177/03

Judge: Herman Cahn

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

HERMAN CAHN

PRESENT:

PART 49

Index Number : 600177/2003

FIELDSTON PROPERTY OWNERS

vs

HERMITAGE INSURANCE COMPANY

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE 12/5/05

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

FILED

AUG 10 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/7/06

Herman Cahn

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----x
FIELDSTON PROPERTY OWNERS
ASSOCIATION, INC.,

Plaintiff,

Index No. 600177/03

-against-

HERMITAGE INSURANCE COMPANY, INC. and
CHUBB GROUP OF INSURANCE COMPANIES,

Defendants.
-----x

Herman Cahn, J.:

This is a declaratory judgment action by plaintiff Fieldston Property Owners Association, Inc. (Fieldston) to recover, from its insurers, legal fees incurred by it in an underlying action. Defendant Federal Insurance Company (Federal) moves for summary judgment dismissing the Amended Complaint and Amended Cross-Claims of defendant Hermitage Insurance Company, Inc. (Hermitage), CPLR 3212. Hermitage cross-moves for summary judgment on its cross-claims against Federal. For the reasons stated below, the motion is granted and the cross-motion is denied.

The facts of this case have previously been set forth in detail in this court's decision dated December 14, 2004. Briefly, Federal issued a Directors and Officers Liability Policy to Fieldston for the term February 13, 1999 to February 13, 2002.

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NEW YORK

Federal also issued a Commercial Umbrella Policy to Fieldston for the term June 5, 2000 to June 5, 2001. Hermitage issued a Commercial General Liability Policy to Fieldston for the term July 5, 2000 to July 5, 2001.

On April 20, 2001, non-party Chapel Farm Estates (Chapel Farm) sent a letter to Fieldston alleging that certain of Fieldston's officers had made false statements and fraudulent claims in connection with Chapel Farm and its right to access its property. On May 14, 2001, Fieldston sent a Notice of Occurrence to Federal regarding Chapel Farm's allegations.

Chapel Farm commenced an action against Fieldston on August 31, 2001, in the U.S. District Court for the Southern District of New York, (*Chapel Farm Estates, Inc., v Moerdler, et al.*, U.S.M.C. S.D.N.Y. 01 Civ 3601 MBM). Fieldston retained the firm of Salans, Hertzfeld, Heilbronn, Christy & Veiner (Salans, Hertzfeld) as its counsel and Salans, Hertzfeld, notified both Federal and Hermitage of the pendency of the lawsuit. In November of 2001, Hermitage appointed Robert Pagano, Esq. as defense counsel on behalf of Fieldston, subject to a full reservation of rights. Federal notified Fieldston that it would not provide a defense.

Fieldston objected to the appointment of Mr. Pagano as counsel and stated that it preferred to be represented by Salans,

[*4]
Hertzfeld. Hermitage took the position that it was entitled to choose counsel pursuant to the policy.

Fieldston asserts that Mr. Pagano eventually told attorneys from Salans, Hertzfeld that he could not handle the Chapel Farm litigation, which caused Fieldston to continue the retention of Salans, Hertzfeld in the Chapel Farm case.

The Chapel Farm action was dismissed on August 19, 2003.

In the meantime, Fieldston commenced the instant declaratory judgment action in January of 2003, seeking to recover its attorneys fees and costs incurred in defending that action. The Complaint alleges that Fieldston incurred in excess of \$130,000 in defending the Chapel Farm action. Fieldston asserted claims against both Federal and Hermitage for failure to defend. In an Answer dated February 10, 2003 Hermitage asserted a cross-claim against Federal for contribution in connection with defense costs.

In a decision dated December 14, 2004, this court granted Federal's motion to dismiss the Complaint as to it. The court also dismissed Hermitage's cross-claim to the extent that Hermitage sought contribution from Federal in connection with the Commercial Umbrella policy issued by Federal. However, the court declined to dismiss the cross-claim to the extent that it sought contribution pursuant to the Directors and Officers policy.

Fieldston served an Amended Complaint on June 17, 2005, asserting claims for breach of contract and bad faith. Hermitage served four amended cross-claims on Federal on June 20, 2005.

Federal now moves for summary judgment dismissing the Amended Complaint. However, Fieldston has stipulated to withdraw any claims against Federal in the Amended Complaint that are based on the Commercial Umbrella Policy. Moreover, Fieldston's remaining claims against Federal are the subject of another motion to dismiss which is pending before this court. Therefore, the court need not address those claims in this decision.

Federal also moves for summary judgment dismissing Hermitage's amended cross-claims.¹

A party moving for summary judgment is required to make a prima facie showing that it is entitled to judgment as a matter of law, by providing sufficient evidence to eliminate any material issues of fact from the case. Winegrad v NYU Medical Center, 64 NY2d 851 [1985]; Grob v Kings Realty Associates, LLC, 4 AD3d 394 [2d Dept 2004]. The party opposing must then demonstrate the existence of a factual issue requiring a trial of the action. Zuckerman v City of New York, 49 NY2d 557, 560 [1980].

¹ Federal refers to Hermitage's "Amended Cross-Claim" although Hermitage asserts four cross-claims related to the underlying action. Based on the moving papers, it appears that Federal seeks dismissal of all the cross-claims.

Hermitage alleges in its cross-claims that it is entitled to contribution from Federal in the event that it is determined that Fieldston is entitled to coverage from Hermitage in connection with the Chapel Farm action. Hermitage alleges that Federal was responsible for defending Fieldston in the underlying action and that Hermitage is entitled to be reimbursed for monies it spent in defending that action.

To the extent that Hermitage seeks contribution from Federal in connection with the Federal Commercial Umbrella Policy, that claim has already been dismissed by this court in the December 14, 2004 decision. Therefore, it is barred by the doctrine of res judicata and law of the case. See, Mancini v Hardscrabble Commons Associates, ___ AD2d ___, ___ NYS2d ___, 2006 WL 2065259 [2d Dept 2006] ("res judicata precludes all claims which could have or should have been litigated in prior proceedings"); City of New York v Welsbach Elec Corp, ___ AD2d ___, 817 NYS2d 11 [1st Dept 2006].

Hermitage also seeks contribution from Federal based on the Federal Directors & Officers Policy. Federal asserts that this claim must be dismissed because the policy was an excess insurance policy and Hermitage, not Federal, was the primary insurer. Federal argues that its obligations to provide a defense were never triggered because the limits of the primary Hermitage policy were

not exhausted.²

"A primary insurer 'has the primary duty to defend on behalf of [its] insureds.'" General Motors Acceptance Corp v Nationwide Ins Co, 4 NY3d 451, 455 [2005], quoting, General Acc Fire & Life Assur Corp v Piazza, 4 NY2d 659, 669 [1958]. "Moreover, a primary insurer has a duty to defend 'without any entitlement to contribution from an excess insurer.'" Id, at 456 quoting Firemen's Ins Co of Washington, DC v Federal Ins Co, 233 AD2d 193 [1st Dept 1996]. An excess carrier may choose to participate in the defense in order to protect its interests, but it is not obliged to do so. Id.

The Federal D&O Policy provides that

If any **Loss** arising from any claim made against the **Insured(s)** is insured under any other valid policy(ies) prior or current, then this policy shall cover such **Loss**, subject to its limitations, conditions, provisions, and other terms, only to the extent that the amount of such **Loss** is in excess of the amount of such other insurance whether such other insurance is stated to be primary, contributory, excess, contingent or otherwise, unless such other insurance is written only as specific excess insurance over the limits provided in this policy.

²The Hermitage policy provided that "[o]ur right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements..." See, Hermitage policy at page 1 [Coverage A, 1(a)(2)] and page 5 [Coverage B, 1(a)(2)].

[* 8]

Loss means the total amount which the **Insured(s)** becomes legally obligated to pay on account of all claims made against it for **Wrongful Acts** with respect to which coverage hereunder applies, including, but not limited to, damages, judgements, settlements, costs and **Defense Costs**. (Emphasis in original).

The Federal D&O policy specifically states that it was excess of any other applicable policy, unless such policy was specifically written as being excess insurance over the limits provided in the D&O policy. It is undisputed that the Hermitage policy was not written as excess insurance over the limits provided in the Federal D&O policy. Therefore, if the Hermitage policy applied to the Chapel Farm action, this would render Hermitage the primary insurer.

As set forth above, the Chapel Farm action was dismissed by the District Court. Therefore, there was never a finding of liability which would have required indemnification from either of the insurers. The issue then is whether Hermitage had a duty to defend Fieldston in the underlying action. If so, that would have rendered Hermitage the primary insurer here and Federal the excess insurer under the Directors and Officers policy.

It is well-settled that "an insurer's duty to defend is broader than its duty to indemnify." General Motors Acceptance Corp

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v Nationwide Ins Co, 4 NY3d 451, 456 [2005], citing Fitzpatrick v American Honda Motor Co, 78 NY2d 61, 65-66 [1991]. This ensures "the adequate and timely investigation of a claim and defense of an insured, regardless of the insured's ultimate likelihood of success on the merits." Id.

An insurer's duty to defend "is not contingent on the insurer's ultimate duty to indemnify should the insured be found liable, nor is it material that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusory provisions." Seaboard Surety Company v The Gillette Company et al, 64 NY2d 304, 310 [1984]. "Rather, the duty of the insurer to defend the insured rests solely on whether the complaint alleges any facts or grounds, which bring the action within the protection purchased." Id. "Indeed, the duty to defend is 'exceedingly broad' and an insurer will be called upon to provide a defense whenever the allegations of the complaint 'suggest...a reasonable possibility of coverage.'" BP Air Conditioning Corp v One Beacon Ins Group, ___ AD2d ___, ___ NYS2d ___, 2006 WL 1843350 [1st Dept 2006], quoting Continental Cas Co v Rapid American Corp, 80 NY2d 640, 648 [1993].

Based on the pleadings in the Chapel Farm action, Hermitage had a duty to defend Fieldston in the underlying action. Among

other things, the Chapel Farm complaint contained a cause of action for defamation. It is undisputed that the Hermitage policy applied to certain claims for defamation. See, Hermitage Policy at Coverage B, Personal and Advertising Injury Liability; see also, Hermitage Policy at Section V, subsection 14. Therefore, there was a "reasonable possibility" that coverage would be required in the underlying action, which would trigger Hermitage's duty to defend Fieldston in that action. As such, Hermitage was the primary insurer and Federal the excess insurer based on the Directors and Officers policy.

Hermitage argues that some of the claims asserted against Fieldston did not fall within the coverage of its policy. However, even assuming that to be a fact, this did not eliminate Hermitage's duty to defend in the underlying action, as set forth above. See, Seaboard Surety Company v The Gillette Company et al, 64 NY2d 304, 310 [1984]. Accordingly, it is

ORDERED that defendant Federal Insurance Company's motion for summary judgment dismissing the Amended Complaint as to it, is denied as moot; and it is further

ORDERED that defendant Federal Insurance Company's motion for summary judgment dismissing the Amended Cross-claims is granted; and it is further

ORDERED that defendant Hermitage Insurance Company's cross-motion for summary judgment is denied; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

DATED: August 7, 2006

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J.S.C.

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