

Royal Surplus Lines Ins. Co. v Zurich Am. Ins. Co.
2007 NY Slip Op 30923(U)
April 19, 2007
Supreme Court, New York County
Docket Number: 0600562/2004
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON
Justice

PART 55

Index Number : 600562/2004
ROYAL SURPLUS LINES INS.
vs
ZURICH AMERICAN INSURANCE
Sequence Number : 004
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE 3/12/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits (TT app under motion 05)
Replying Affidavits _____

1-4
5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided together
with the motion made under sequence no. 05 in
accordance with the entered memorandum decision,
order, declaration and judgment.

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

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 deposit to person at the County Clerk's Desk (Room

Dated: 4/19/07

JANE S. SOLOMON 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 : IAS PART 55

-----X

ROYAL SURPLUS LINES INSURANCE COMPANY,

Plaintiff,

-against-

INDEX NO. 600562/04

ZURICH AMERICAN INSURANCE COMPANY,
formerly ZURICH INSURANCE COMPANY,

DECISION, ORDER,
DECLARATION AND
JUDGMENT

Defendant.

JANE S. SOLOMON, J.

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

Both parties move to reargue an earlier decision and order dated October 11, 2006 ("prior order"), which denied each party's motion for summary judgment in this declaratory judgment action for insurance coverage. The motions are granted as follows.

In September 1999, J.A. Jones-GMO, LLC ("J.A. Jones") was general contractor of a construction project in a building owned by New York University ("NYU"). Helmark Steel, Inc. ("Helmark") was a subcontractor hired by J.A. Jones. A construction worker named Michael Kazmierczuk ("Kazmierczuk") suffered serious injuries on the job; his employer was a Helmark subcontractor.

Kazmierczuk brought a lawsuit (the "underlying action") in Supreme Court, Kings County, under the Labor Law in December 1999, naming NYU and J.A. Jones as defendants. J.A. Jones and NYU sued Helmark in a third-party action for contractual indemnification and breach of a contractual duty to procure

Zurich, which the presiding justice recognized and described as "bad faith" and borderline "unethical." Cornell Aff., annexed to Zurich Notice of Motion, paragraphs 5-6.

The transcript of the stipulation of settlement on the record indicates that Ms. Cornell stated that her clients did not agree to the reasonableness of the settlement with respect to liability or damages, and that "the agreement to pay \$500,000 has solely been paid by [Royal Surplus]." Zurich Motion for Summary Judgment, Exhibit 11, p. 5 (sic). She then said: "It is stipulated to by all counsel?" The response from Helmark's attorney was "So stipulated." Id. He did not assert that the offer to settle was made on NYU's behalf.

NYU subsequently learned that Helmark's counsel sent a release to Kazmierczuk, which he executed, stating that Royal Surplus's payment was made "on behalf of New York University," even though counsel never was authorized to act on NYU's behalf, and Helmark's effort to frame the settlement made on the record in that fashion was rebuffed by the court. Also contrary to the terms of the settlement made on the record, the release failed to name J.A. Jones as a released party.

After plaintiff accepted the offer, NYU and J.A. Jones agreed to settle their indemnification claims against Helmark for \$30,000, and executed general releases on that basis. Helmark abandoned its appeal of the order granting summary judgment against it, and paid the \$30,000.

In this lawsuit, Royal Surplus seeks declaratory judgment that it is entitled to recover \$250,000, i.e., one half of the sum it paid to settle the underlying action, on the grounds that both parties co-insured NYU on a primary basis. Royal Surplus contends that the settlement was made on behalf of NYU, not Helmark, and therefore Zurich must share that indemnity on an equal basis. In support of that argument, it contends that NYU could have been vicariously responsible for Kazmierczuk's entire claim had it gone to verdict. Zurich vigorously opposes the argument and characterizes this action as an exercise in sharp practice designed to circumvent the settlement it agreed to in the Kings County court.

A problem with Royal Surplus's argument is that its direct insured, Helmark, owed contractual indemnification to NYU. It abandoned its appeal of the order granting summary judgment on that issue. NYU was represented by counsel in the underlying action, and it did not offer to settle the lawsuit, or even participate in the negotiation with Kazmierczuk. There was no judgment entered against NYU for which Zurich shared a duty of coverage as a primary co-insurer.

Royal Surplus relies upon the First Department decision in National Union Fire Ins. Co. of Pittsburgh v Hartford Ins. Co., 248 AD2d 78 (1st Dept 1998), and similar authority from other jurisdictions. As a general proposition of the law of co-insurance, National Union provides a basis for the position Royal

Surplus has asserted here regarding the obligations of two carriers with coverage for the same risk. It is distinguishable under the facts of this case. In particular, the undisputed facts demonstrate that Helmark's counsel obtained releases in defiance of the oral direction of the presiding justice, albeit not in the form of a formal order, and thereby sought to alter the terms of the settlement. NYU and Zurich, as its co-insurer, acquiesced to the settlement in reasonable reliance upon the trial court and Royal Surplus's offer to resolve their dispute with Zurich by paying the legal costs incurred.

In the prior order, I held that the circumstances of the settlement raised triable issues of fact regarding Zurich's coinsurance obligations. Upon reargument, I now hold that there are no triable issues of fact, and that Zurich is entitled to summary judgment dismissing the complaint as a matter of law. NYU's obligation to pay a judgment or settlement on Kazmierczuk's claim never arose in the underlying action. Helmark initially contested its contractual obligation to NYU and J.A. Jones, but Royal Surplus apparently determined that its interests were better served by resolving Kazmierczuk's claim on favorable terms (and limiting Helmark's exposure) than continuing the fight. Royal Surplus's decision to manage its own risk arising from the policy it issued to Helmark is not chargeable to NYU, nor to Zurich as its co-insurer. Royal Surplus has not shown that there were any "collectible" insurance proceeds from the Zurich policy

[* 6]
to indemnify NYU for liability in the underlying action, where NYU was not found liable for damages arising from Kazmierczuk's claim, and neither NYU nor Zurich authorized any payments beyond defense costs.

The court is persuaded by Zurich's contention that this dispute arises from sharp practice in connection with the underlying action that ought not to be rewarded. The argument by Royal Surplus that the circumstances of the underlying action are of no consequence is incorrect. Accordingly, it hereby is

ORDERED that the motions to reargue (sequence numbers 4 and 5) are granted, and upon reargument, it is

ORDERED that Royal Surplus's motion for summary judgment is denied; and it further is

ORDERED, ADJUDGED and DECLARED that Zurich's motion for summary judgment is granted, and it is declared that Zurich is not obligated to reimburse Royal Surplus as a coinsurer of NYU's liability in the underlying action, and the complaint is dismissed, with costs and disbursements to Zurich as taxed, and the Clerk is directed to enter judgment accordingly.

Dated: April 19, 2007

ENTER:



J. S. C.

UNFILED JUDGMENT
JANE S. SOLOMON
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).