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

PRESENT: _____ PART _____

Justice

Index Number : 102623/2005

EVEREADY INSURANCE

VS

ILLINOIS NATIONAL INSURANCE

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

is motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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 11B).

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

Dated: 9/26/07

J.S.C.

WALTER B. TOLUB

Check one: ___ FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 15

EVEREADY INSURANCE COMPANY,

Plaintiff,

-against-

Index No: 102623/05
Motion Seq. 01

ILLINOIS NATIONAL INSURANCE COMPANY and AMERICAN HOME ASSURANCE COMPANY,

Defendants.

TOLUB, J.:

Plaintiff, Eveready Insurance Company, (Eveready), moves, pursuant to CPLR 3212 for summary judgment seeking an order declaring defendant American Home Assurance Company (American Home) to be a co-insurer, responsible to contribute to Eveready. American Home, cross-moves for an order dismissing all claims as against it.

This is an action for a declaratory judgment wherein Eveready seeks a declaration of the respective obligations of Eveready and American Home in connection with the settlement of an underlying automobile/personal injury action called *Wan v Santos and Domino's Pizza*, Index No. 779/01, Supreme Court, Kings County (the Wan Action).

The Wan Action arose from an auto accident in August 2000 involving Eveready's named insured, Robert Santos (Santos), while

he was acting in the course of his employment as a delivery man with American Home's insured, Domino's Pizza, Inc. (Domino's). Santos was driving a car owned by him and admittedly covered by the Eveready policy. The Wan Action was settled for $40,000 with Eveready contributing its policy limits of $25,000 on behalf of its insured, Santos, and American Home contributing $15,000 on behalf of its insured Domino's (Settlement). Eveready, in connection with the Settlement, reserved its rights to pursue Domino's and/or American Home to recover amounts paid by Eveready.

Eveready now contends that, since Eveready and American Home were "co-insurers" of Santos with respect to the Wan Action, with "similar" "other insurance clauses," American Home should have contributed to the Settlement of the Wan Action on behalf of Santos on a pro rata basis.

According to American Home, while Eveready and American Home do provide concurrent coverage to Santos for the Wan Action with ostensibly similar "other insurance" clauses, resort must be made to analyze the particular terms of "other insurance" clauses in the respective policies to determine the respective obligations of the concurrent insurers.

The policy issued by Eveready to Santos, policy number 05-092848, is a primary automobile policy with limits of $25,000 for the policy period August 27, 1999 to August 27, 2000. The "Other Insurance" provision of the Eveready policy reads as follows:

> If there is other valid and collectible insurance, we pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. **However, insurance we provide for a vehicle you do not own shall be excess over any other valid and collectible insurance,** including physical damage insurance provided under this or any other policy.

The Eveready policy defines the term "you" as the "named insured," i.e., Santos, or his wife. Thus, the other "other insurance" clause in the Eveready policy makes a distinction between, and affords different coverage to vehicles owned by Santos and those not owned by Santos.

Here, the salient missing fact from plaintiff's argument was that the other insurance clauses in the policies clearly operate differently, depending upon ownership of the auto giving rise to the claim. The clauses provide for primary coverage for "autos" owned by the "Named Insured" and excess coverage with respect to autos not owned by the Named Insured. It is undisputed that Santos was the named insured under the Eveready policy, and the owner of the auto involved in the accident. Thus, it is clear from the language in the Eveready policy that it would provide primary coverage and the American Home Policy coverage would be excess to Eveready's coverage by operation of the other insurance clauses in the policies (*General Acc Fire & Life Assr. Corp v Piazza*, 4 NY2d 659, 669 [1958]; *Nationwide Mutual Ins. Co. v Travelers Ins. Co.*, 8 AD3d 861, 862-3 [3rd Dept

2004]). Since Santos' liability was resolved by payment of the Eveready policy, there was no reason for American Home as an excess insurer to contribute anything on behalf of Santos.

American Home issued policy no. 3209674 (effective 12/20/99 - 12/20/00) to Domino's proved $ 1,000,000 in liability coverage per accident or occurrence (the American Home Policy). It is not disputed that Santos would qualify as an insured under the terms of the American Home Policy.

The Other Insurance provision of the American Home Policy reads, in relevant part:

> 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

(emphasis added).

> 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.

The American Home Policy defines the "you" as "the Named Insured shown in the Declarations." The uninsured named on the Declaration page of the American Home Policy is Domino's Pizza, Inc. (Ex G). Thus, the other insurance clause in the American Home policy makes a clear distinction between, and affords different coverage to autos owned by Domino's and those not owned by Domino's.

Summary judgment should be granted if "upon all the papers and proof submitted, the defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR 3212 [b]). A party opposing summary judgment must come forward with proof sufficient to raise a triable issue of fact; "mere conclusions, expressions of hope or unsubstantiated allegations or assertions" are insufficient (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

It appears that no issues of fact, triable or otherwise-are presented by the instant application, which can be resolved with reference to the information submitted by the parties.

In support of its motion for summary judgment, Eveready cites a number of cases where it was established by a court that various insurers were in fact co-insurers. Unlike those cases cited, here there is no dispute that Eveready and American Home are co-insurers. Rather, the issue presented is, in light of the concurrent insurance, what are the rights and obligations of the insurers pursuant to their "other insurance clauses."

In determining the respective rights and/or obligations of the multiple insurance companies providing coverage for a particular claim, resort is made to the "other insurance" clauses of insurance policies where two or more policies of insurance cover the same risk for the benefit of the same person. Where an insured has multiple potentially applicable policies for a particular claim, courts determine the insurers' respective

obligations to the insured by analyzing the "other insurance" clauses of the policies under a body of law developed to resolve such "other insurance" disputes (*State Farm Fire & Casualty Co. v LiMauro*, 65 NY2d 369, 372 [1985]).

"Pro-rata clauses" usually provide that if other insurance exists, the insurer will pay its pro-rata share of the loss, usually in the proportion that its policy limits bears to the aggregate limit of all other valid and collectible insurance.

"Generally, where the terms regarding payment obligations in two or more policies conflict,"insurers must contribute in the proportion their policies bear to the limit of coverage at that evel [citations omitted]" (*Nationwide Mutual Ins Co v Travelers Insurance Co.*, 8 AD3d at, 862-3).

An examination of the other insurance clauses in the Eveready and American Home policies indicates that the respective policies will function as primary insurance where the auto at issue is owned by the "Named Insured" under the policy and will contribute pro-rata with any other available primary insurance. Both policies also clearly state that where the auto involved is not owned by the "Named Insured" the policy will function as excess insurance.

Here, there is no question that the auto involved in the accident was owned by Santos. It is also clear that Santos is a

named insured under the Eveready Policy.

Therefore, by the clear language of the other insurance clauses in the policies, Eveready's coverage is primary and American Home's is excess. Thus, Eveready was required to pay its entire policy limit of $25,000 on behalf of Santos before the American Home Policy would be required to respond. Since Santos's liability was resolved by payment of the Eveready policy limits, there was no need for American Home to contribute anything on behalf of Santos.

Accordingly, it is

ORDERED that Eveready's motion for summary judgment is denied; it is further

ORDERED and ADJUDGED that although American Home is a co-insurer, its not required to contribute to Eveready; it is further

ORDERED that American Home's cross motion for summary judgment is granted; it is further

ORDERED and ADJUDGED that American Home is not required to contribute to Eveready.

Dated: 9/24/07

ENTER

Hon. Walter B. Tolub, J.S.C.