

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

2007 NY Slip Op 34405(U)

January 17, 2007

Supreme Court, New York County

Docket Number: 402063/05

Judge: Herman Cahn

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

PRESENT: HERMAN CAHN Justice

PART 49

Hermitage Insurance
Plaintiff
- v -
Fieldston Property
Defendant

INDEX NO. 402063/05
MOTION DATE 7/24/06
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

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

Cross-Motion: Yes No

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

FILED
JAN 25 2007
NEW YORK COUNTY CLERK
MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE

January 17, 2007 Herman Cahn
J.S.C.

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

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

-----x

HERMITAGE INSURANCE COMPANY, INC.,

Plaintiff,

-against-

402063/05
Index No. 08723704

FIELDSTON PROPERTY OWNERS
ASSOCIATION, INC., MICHAEL GOODWIN,
MARC MOELLER, TRAVIS EPES and FEDERAL
INSURANCE COMPANY,

Defendants.

-----x

FILED
JAN 25 2007
NEW YORK
COUNTY CLERKS OFFICE

Herman Cahn, J.:

This is a declaratory judgment action brought by plaintiff Hermitage Insurance Company, Inc. (Hermitage). It arises in connection with an underlying action against its insured, defendant Fieldston Property Owners Association, Inc. (Fieldston).

Defendant Federal Insurance Company (Federal) moves for summary judgment, CPLR 3212. Hermitage cross-moves for summary judgment on its claim against Federal. For the reasons stated below, the motion and cross-motion are denied.

Hermitage issued a Commercial General Liability Policy to Fieldston for the period July 5, 2000 to July 5, 2001. Federal issued a Directors and Officers Liability Policy (D&O Policy) for the period February 13, 1999 to February 13, 2002. Federal also

issued a Commercial Umbrella Policy to Fieldston for the period June 5, 2000 to June 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, specifically with its right to access its property. Fieldston sent a Notice of Occurrence to Federal regarding Chapel Farm's allegations on May 14, 2001.

Chapel Farm commenced an action against Fieldston on August 31, 2001, in the US District Court for the Southern District of New York.

Fieldston retained counsel, which notified both Federal and Hermitage of the lawsuit.

In November of 2001, Hermitage retained 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 counsel retained by Hermitage and stated that it preferred to be represented by counsel it chose. Hermitage responded that it was entitled to choose counsel pursuant to the policy.

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

the meantime, Fieldston had commenced a declaratory judgment action in January of 2003, seeking to recover attorneys fees and costs incurred in defending the Chapel Farm action.

In a decision dated December 14, 2004, this court granted Federal's motion to dismiss the Complaint as well as Hermitage's cross-claim seeking contribution from Federal in connection with the general liability 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 amended cross-claims on Federal on June 20, 2005.

Federal then moved for summary judgment dismissing Hermitage's amended cross-claims. Hermitage alleged that it was entitled to contribution from Federal to the extent that it is determined that Fieldston is entitled to coverage from Hermitage in connection with the Chapel Farm action. Hermitage alleged that Federal was responsible for defending Fieldston in the underlying action and that Hermitage is entitled to be reimbursed for monies spent in defending that action.

In a decision dated August 7, 2006, this court found that Hermitage was not entitled to reimbursement from Federal based on

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the D&O Policy because the Federal policy was excess to the Hermitage Policy. The Federal policy specifically stated that it was excess over other policies, except under certain circumstances not applicable in this case. The court further found that Hermitage had a duty to defend Fieldston in the underlying action, based on the policy provisions, without contribution from the excess insurer, Federal.

On October 1, 2003, an action had been commenced in Bronx County Supreme Court captioned Villanova Estates Inc (f/k/a Chapel Farm Estates, Inc;) v The Fieldston Property Owners Association, Inc, Michael Goodwin, Marc Moeller, and Travis Epes. Index No. 24792/2003. The Complaint set forth twenty-one causes of action, including various claims for wrongful interference with property rights, as well as injurious falsehood and defamation.

On October 24, 2003, Hermitage sent Fieldston a reservation of rights letter, stating that the cause of action for injurious falsehood was potentially covered and Hermitage would therefore assign counsel to Fieldston to defend the Villanova action.

On January 6, 2004, Federal issued a letter reserving its rights and stating that the Federal D&O Policy was strictly excess of the Hermitage policy.

In an order dated September 13, 2004, the court granted, in

part, Fieldston's motion to dismiss the complaint, including the claim for injurious falsehood. In a decision dated November 1, 2005, the Appellate Division, First Department, among other things, affirmed that portion of the trial court's order dismissing the claim for injurious falsehood. 23 AD3d 160, 161 [1st Dept 2005].

Hermitage commenced the instant action on June 4, 2004, seeking a declaration that it is not obliged to defend or indemnify Fieldston in the Villanova action. It also seeks a declaration that Federal is obligated to indemnify Hermitage for any defense or indemnification costs it may incur in providing a defense to Fieldston in the Villanova action. Both parties now move for summary judgment.

Federal argues that it is entitled to summary judgment because the Federal Umbrella policy and the D&O policy are excess to the Hermitage policy. Federal argues that its obligations to provide a defense in the Villanova action were never triggered because the limits of the primary Hermitage policy were not exhausted.

Federal's argument is based on the provisions of both policies. The Commercial Umbrella Policy set forth that

If other insurance applies to claims covered by this policy, the insurance under this policy is excess and we will not make any payments until the other insurance has been exhausted by payment of claims. This insurance

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is not subject to the terms or conditions of any other insurance.

The Federal D&O Policy provided 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.

(Emphasis in original).

Hermitage argues that the Federal policies are not excess insurance in the context of the instant action. It contends that none of the underlying claims in the Villanova action fall within the scope of the Hermitage policy. Therefore, Hermitage claims that the Federal policies cannot be considered excess of the Hermitage policy in the context of the Villanova action.

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

* 8] .
existence of a factual issue requiring a trial of the action. Zuckerman v City of New York, 49 NY2d 557, 560 [1980]. Here, neither party has demonstrated that it is entitled to summary judgment.

"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 [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., quoting Firemen's Ins. Co. of Washington, DC v Federal Ins. Co., 233 AD2d 193 [1st Dept 1996]. The excess carrier may choose to participate in the defense in order to protect its interests, but it is not obliged to do so. Id. See, BP Air Conditioning Corp. v One Beacon Ins. Group, 33 AD2d 116 [1st Dept 2006].

Here, neither party has demonstrated as a matter of law that the Federal policies are excess to the Hermitage policy. Based on the policy provisions set forth above, the Federal policies may be excess if some or all of the Villanova causes of action are covered by the Hermitage policy. However, there has been no such finding as yet in the Villanova action, in which Hermitage's defense was provided under a reservation of rights, and neither party has made

such a demonstration in the instant action. Therefore, it is premature for this court to declare whether Federal is obligated to indemnify Hermitage for any defense or indemnification costs it may incur in providing a defense to Fieldston in the Villanova action. See generally, Allcity Ins. Co. v Fisch, 32 AD3d 407 [2d Dept 2006]; State Farm Fire & Cas. Ins. Co. v Meis, 23 AD3d 372 [2d Dept 2005].

Accordingly, it is

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

ORDERED that plaintiff's cross-motion for summary judgment is denied.

DATED: January 17, 2007

FILED
JAN 25 2007
NEW YORK
COUNTY CLERK'S OFFICE
ENTER:

Alan Cohen

J.S.C.