Insurance Corp. of N.Y. v United States Fire Ins. Co.

2008 NY Slip Op 31750(U)

June 23, 2008

Supreme Court, New York County

Docket Number: 0600469/2007

Judge: Carol R. Edmead

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SCANNED ON 6/24/2008

[* 1]

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

PRESENT: EDMEAD, Justice — PART 35

INDEX NO. 600469/07
MOTION DATE 6/12/08
MOTION SEQ. NO. 2
MOTION CAL. NO.

Insurance Corporation of NY

- v -

U.S. Fire Insurance Co.

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

FILED
JUN 24 2008
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion

In accordance with accompanying Memorandum Decision, it is hereby

ORDERED that the motion by Inscorp pursuant to CPLR 2221(e) for renewal, is granted, and upon renewal, Inscorp's request for summary judgment declaring that the obligation of defendant US Fire to provide excess coverage to defendant BFC Construction was triggered due to the exhaustion of Inscorp's policy with BFC, is denied. And it is further

ORDERED that US Fire's request for an Order of rescission of the Policy due to BFC's and/or BFC's agent's misrepresentations and/or fraudulent statements that the policies referred to on the Schedule of Underlying Insurance, including the Reliance Policy were obtained, is denied. And it is further

ORDERED that Inscorp serve a copy of this Order and Memorandum Decision upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

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

Dated: 6/23/08

HON. CAROL EDMEAD 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 35

THE INSURANCE CORPORATION OF NEW YORK,

Plaintiff,

-against-

UNITED STATES FIRE INSURANCE COMPANY
and BFC CONSTRUCTION CORP.,

Defendants.

Index No. 600469/07

DECISION/ORDER

Motion #002

FILED
JUN 24 2008
COUNTY CLERK'S OFFICE
NEW YORK

CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this insurance declaratory judgment action, plaintiff, The Insurance Company of New York ("Inscorp"), moves pursuant to CPLR 2221(e) for renewal, and upon renewal, granting summary judgment to Inscorp declaring that the obligation of defendant United States Fire Insurance Company ("US Fire") to provide excess coverage to defendant BFC Construction ("BFC") was triggered due to the exhaustion of Inscorp's policy with BFC.

This action arises out of a dispute over insurance coverage concerning three personal injury suits commenced against BFC, entitled *Dagati v BFC Construction, et al.* (the "Dagati Action"), *Torres v BFC Construction, et al.* (the "Torres Action"), and *Regolodo v BFC Construction, et al.* (the "Regolodo Action") (collectively, the "underlying actions").[1]

Inscorp issued a Commercial General Liability policy to defendant BFC for the period of January 1, 2001 to January 1, 2002, with coverage limits of $1,000,000 for each occurrence subject to a $2,000,000 General Aggregate Limit (the "Inscorp Policy"). US Fire provided excess liability coverage to BFC under a policy which covers the period of January 1, 2001

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[1] The plaintiffs in the underlying actions allegedly suffered injuries at a construction site where defendant BFC was performing work.

through January 1, 2002 (the "US Fire Policy"). The US Fire Policy provides coverage with limits of $5,000,000 for each occurrence and $5,000,000 in the aggregate, in excess of coverage provided by Inscorp.

Prior Motion

Inscorp moved for summary judgment declaring that (1) the coverage provided under the Inscorp Policy had been exhausted; (2) US Fire is obligated to indemnify Inscorp for the portion of the payment made by Inscorp toward the settlement of the Torres Action that was in excess of the Inscorp Policy $2 million limit; (3) US Fire is obligated to reimburse the costs incurred by Inscorp subsequent to the exhaustion of the Inscorp Policy in defending BFC in the Regolodo Action; and (4) US Fire is required to assume the defense of BFC in the Regolodo Action.

This Court granted, in part, Inscorp's motion, holding that the Inscorp Policy provides coverage up to a $2,000,000 General Aggregate limit and the Designated Construction Project(s) General Aggregate Limit Endorsement does not apply to Torres and Regolodo. However, the Court declined to find that the Inscorp Policy was exhausted so as to trigger the US Fire Policy. The Court noted that under its Policy, US Fire would

> "[P]ay on behalf of the insured for that amount of loss **which exceeds the amount of loss payable by underlying policies** described in the Declarations, but the Company's obligation hereunder shall not exceed the limit of liability stated in Declaration 6.

The Court concluded that the record failed to establish that two underlying policies, namely the "Transcontinental Policy" and "Reliance Policy," were exhausted.[2]

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[2] According to Inscorp, subsequent to the Court's decision, it withdrew from the defense of BFC in the Regolodo Action. US Fire then stated that it would not assume the defense of BFC in the Regolodo Action because the US Fire Policy was not triggered. BFC's defense counsel in the Regolodo Action recently filed an order to show cause to be relieved as counsel. Thus, Inscorp moved herein for renewal in order to compel US Fire to pick up the defense of BFC in the Regolodo Action.

Instant Motion to Renew

In support of renewal, Inscorp points out that the Transcontinental Policy expired on July 22, 2001, prior to the dates of loss for the Torres and Regolodo Actions. The date of loss in the Torres Action was July 30, 2001 and the date of loss for the Regolodo Action was July 23, 2001.

As to the Reliance Policy, a claims handler at Reliance advised Inscorp that (1) the name of the insured was "BFC Lincoln Associates c/o PWB Management Corp." and that (2) said Policy expired in 2000 and was not renewed. Thus, both policies do not apply to either the Torres or Regolodo Actions. As such, US Fire's Policy has triggered since all applicable underlying policies have been exhausted.

Further, US Fire failed to produce any discovery indicating that either of these underlying policies applies so as to provide coverage to BFC. Therefore, summary judgment in favor of Inscorp is warranted.

Opposition

In opposition, US Fire argues that it is conceded that the Reliance Policy was in effect, but was issued to "BFC Lincoln Associates c/o PWB Management Corp." Inscorp's position, that the Reliance Policy expired in 2000 and was not renewed, lacks any support from Reliance or BFC. Moreover, the US Fire Policy has a precondition to coverage, that the underlying insurance policies remain in force during the policy period. And, to the extent BFC failed to maintain the specified underlying insurance, the US Fire Policy expressly provides that it applies as if those underlying policies were "available" and "collectible."

Furthermore, the US Fire Policy provides that if any underlying policy does not pay for a loss for reasons other than the exhaustion of insurance, then US Fire shall not pay such loss. Finally, US Fire requests that to the extent that it is determined that the policies referred to on the

Schedule of Underlying Insurance, including the Reliance Policy, were not in effect or were not procured, US Fire seeks an Order of rescission of the Policy due to BFC's and/or BFC's agent's misrepresentations and/or fraudulent statements that such insurance was obtained.

Reply

Inscorp adds that the US Fire Policy shows BFC as the first of 13 listed named insureds and the general liability coverage purportedly issued by Reliance and Transcontinental is stated to apply to three other underlying named insureds: BFC Lincoln Associates LP, BFC-EH Partners, LP and 176 Hopkinson Associates & Urban Strategies Management Corp. Inscorp also contends that as to the Reliance Policy, US Fire's underwriter advised BFC's broker in a November 2000 fax that the US Fire Policy would be canceled if Reliance was not replaced, stating that it required "all underlying carriers maintain a Best Rating of A- or better." BFC's broker responded that it had obtained approval for the replacement of Reliance with New Hampshire Insurance Company (the "New Hampshire Policy"). Thus, the US Fire Policy was issued with the express understanding that Reliance would not be a primary liability insurer. US Fire also confirmed, by letter dated January 2, 2001, that the US Fire Policy was issued in conformance with the broker's application. An Endorsement to the US Fire Policy, Form 100.0.14, sets forth the "Named Insureds" to be the same 13 Scheduled underlying insureds attached to the broker's November 2000 insurance application and December 2000 binder of insurance.

Such documents show that no other primary liability policies are applicable to the Torres and Regolodo Actions. Since the Inscorp Policy has been adjudged to be exhausted, the US Fire Policy's excess defense and indemnity obligations have been triggered.

Sur-Reply by US Fire

US Fire argues that despite Inscorp's assertion that the Reliance Policy was not obtained, the fact remains that it is listed on the Schedule of Underlying Insurance. Therefore, the US Fire Policy is not triggered until that $1,000,000 of "coverage" is exhausted. As to the US Fire Policy application, document showing Reliance would not be the primary insurer, and letter from US Fire's letter indicating that the Policy was issued in conformance with the application, such extrinsic documents are unnecessary to interpret the unambiguous terms of the Policy.

Additionally, once the US Fire Policy was issued on January 2, 2001, the terms of the binder previously dated December 22, 2001 terminated, and the Policy controls. The binder is "Temporary Insurance Contract." Moreover, the binder does not indicate that the policies listed on the Schedule of Underlying Insurance were issued to another Named Insureds under the Policy.

The fax that refers to the Reliance Policy being replaced by the New Hampshire Policy does not show that the US Fire Policy was issued with the understanding that Reliance would not be a primary insurer. In any event, such fax raises an issue of fact as to whether the New Hampshire Policy was in effect at the time of the underlying accident, and should also be exhausted before the US Fire Policy is triggered.

Furthermore, the US Fire application is not a binder or policy, and should not be considered. Thus, pursuant to the clear terms of the US Fire Policy, such policy is only triggered after all underlying insurance is exhausted.

Analysis

Pursuant to CPLR 2221 a motion for leave to renew: "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination"; and "shall contain reasonable justification for the failure to present such facts on the prior motion." Thus, the motion to renew, when properly made, posits newly discovered facts that were not previously available or a sufficient explanation is made why they could not have been offered to the Court originally (*see discussion in Alpert v Wolf*, 194 Misc 2d 126, 133, 751 NYS2d 707; D. Siegel New York Practice § 254 [3rd ed.1999]). A motion to renew, "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention" (*Beiny v Wynyard*, 132 AD2d 190, 522 NYS2d 511, *lv dismissed* 71 NY2d 994, 529 NYS2d 277)"

The Court finds that the "new facts," consisting of additional documents obtained by Inscorp during the course of discovery subsequent to the prior motion warrant the grant of renewal. However, upon further review, the Court adheres to its original determination.

The US Fire Policy provides, in pertinent part, as follows:

1. **Condition B. Maintenance of Underlying Insurance** is replaced by the following:

   B. Maintenance of Underlying Insurance. It is agreed by the insured that the underlying insurance, as stated in item 5 of the Declarations:

   (1) shall remain in force during the period of this policy; . . . .

* * * * *

If the insured does not meet these requirements, this insurance shall apply as

if those policies were available and collectible.

2. **Condition L. Bankruptcy or insolvency of Underlying Insurer** is added to policy.

L. Bankruptcy or Insolvency of Underlying Insurer. If an underlying insurance is stated in Item 5 of the Declarations, is not collectible because of bankruptcy or insolvency of the insurer, this policy shall apply as if the underlying insurance were available and collectible.

Item 5 of the "Declarations" page, entitled "Controlling Underlying Insurance," expressly refers "SCHEDULE A ATTACHED." Schedule A attached thereto lists "Reliance National" for the policy period of "03/15/99 - 03/15/02" and "Transcontinental" for the policy period of "07/22/00 - 07/22/01."

It is well established that when interpreting an insurance contract, as with any written contract, the court must afford the unambiguous provisions of the policy their plain and ordinary meaning (*United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232, 501 NY.S.2d 790, 492 N.E.2d 1206 [1986]; *Seaport Park Condominium v Greater New York Mut. Ins. Co.*, 39 AD3d 51, 828 NYS2d 381 [1st Dept 2007]; *Roundabout Theatre Co. v Continental Cas. Co.*, 302 A.D.2d 1, 6, 751 N.Y.S.2d 4 [2002]).

Excess or umbrella policies do not contribute to a loss until the limits of the underlying primary policy have been reached (*Steyr-Daimler-Puch A.G. v Allstate Ins. Co.*, 151 AD2d 942, 543 NYS2d 538 [3d Dept 1989] *citing State Farm Fire & Cas. Co. v LiMauro*, 65 NY2d 369 [1985]).

Pursuant to Condition B of the US Fire Policy, BFC, the named insured, was obligated to maintain the Transcontinental Policy from July 22, 2000 through July 22, 2001. There was no obligation on behalf of BFC to maintain coverage subsequent to July 22, 2001. Since both losses

in the Torres and Regolodo Actions occurred after the expiration of such Policy, the Transcontinental Policy does not apply to either underlying Actions and Condition B does not operate so as to require exhaustion of the Transcontinental Policy.

However, Condition B of the US Fire Policy required the maintenance of the Reliance Policy from "March 15, 1999 through March 15, 2002" as a condition precedent to coverage. The dates of losses for the Torres and Regolodo Actions occurred prior to the expected expiration of the Reliance Policy. Thus, unlike the Transcontinental Policy, since the dates of loss in the Torres and Regolodo Actions occurred during Transcontinental Policy's stated period, exhaustion of such Policy is required in order to trigger coverage under the US Fire Policy.

Inscorp's claims that the Transcontinental Policy expired in 2000, was never renewed, and named "BFC Lincoln Associates c/o PWB Management Corp." is inconsequential. Condition B of the US Fire Policy expressly states that "If the insured does not meet these requirements, this insurance shall apply as if those policies were available and collectible." Condition B is clear and unambiguous; the US Fire Policy is triggered upon the exhaustion of the applicable underlying policies as stated in the Declaration page and Schedules referenced therein. Pursuant to Schedule A, maintenance of the Reliance Policy through March 15, 2002 is required, regardless of whether such Policy was actually obtained or maintained. And, in the event such Policy was not obtained or maintained, the US Fire Policy treats such Policy as a collectible policy, which must be exhausted before US Fire's insurance obligation is triggered.

However, the fax from US Fire's claim representative, Crum & Foster, dated November 22, 2000, states that the US Fire Policy will be "cancelled if Reliance is not replaced as one of the underlying carriers." The fax also contains an indication in response, that the Reliance Policy

was possibly replaced by "New Hampshire Insurance Company." Therefore, to the extent Inscorp maintains that US Fire required that BFC replace the Reliance Policy with different insurance carrier, and issued the Policy with such understanding, and to the extent the fax indicates that New Hampshire Insurance Company replaced the Reliance Policy, an issue of fact remains as to whether all applicable underlying insurance coverage has been exhausted so as to trigger the US Fire excess Policy.

Conclusion

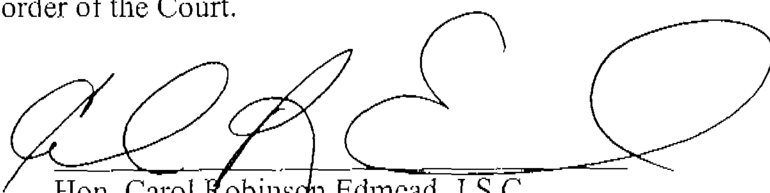
Based on the foregoing, it is hereby

ORDERED that the motion by Inscorp pursuant to CPLR 2221(c) for renewal, is granted, and upon renewal, Inscorp's request for summary judgment declaring that the obligation of defendant US Fire to provide excess coverage to defendant BFC Construction was triggered due to the exhaustion of Inscorp's policy with BFC, is denied. And it is further

ORDERED that US Fire's request for an Order of rescission of the Policy due to BFC's and/or BFC's agent's misrepresentations and/or fraudulent statements that the policies referred to on the Schedule of Underlying Insurance, including the Reliance Policy were obtained, is denied. And it is further

ORDERED that Inscorp serve a copy of this Order and Memorandum Decision upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.



Dated: June 23, 2008

Hon. Carol Robinson Edmead, J.S.C.

FILED
JUN 24 2008
COUNTY CLERK'S OFFICE
NEW YORK