

United States Fire Ins. Co. v Illinois Union Ins. Co.

2009 NY Slip Op 30031(U)

January 7, 2009

Supreme Court, New York County

Docket Number: 116061/07

Judge: Jane S. Solomon

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

JANE S. SOLOMON

PRESENT:

PART 55

Justice

Index Number : 116061/2007

U.S. FIRE INSURANCE COMPANY

VS.

ILLINOIS UNION INSURANCE COMPANY

SEQUENCE NUMBER : # 001

DISMISS COMPANY

INDEX NO. 116061-07

MOTION DATE 8/8/08

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this motion to/for

PAPERS NUMBERED

1-3
4-5

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

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the enclosed memorandum decision, order and declaratory judgment.

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

Dated: 1-7-09

JANE S. SOLOMON 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 55

-----X

UNITED STATES FIRE INSURANCE COMPANY,

Plaintiff,

-against-

INDEX NO. 116061/07

ILLINOIS UNION INSURANCE COMPANY,

DECISION, ORDER and
DECLARATORY JUDGMENT

UNFILED JUDGMENT
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appear in person at the Judgment Clerk's Desk (Room
141B).*

JANE S. SOLOMON, J.

Defendant Illinois Union Insurance Company (Illinois Union) moves to dismiss this action for declaratory judgment that arises from a claim by Donald Trella that he sustained personal injuries in an accident in a trailer used by Bay Crane Service, Inc. (Bay Crane). Bay Crane had a commercial general liability (CGL) policy with Illinois Union, and an automotive liability policy with plaintiff United States Fire Insurance Company (USF).

Trella alleged that he fell through a hole or unguarded opening in the trailer while he was unloading cable from it. He commenced a lawsuit (the underlying action) in Supreme Court, Suffolk County, with three causes of action. The first cause of action alleges common law negligence, and the second and third causes of action seek recovery under New York State Labor Law sections 200 and 241(6) (see, Trella Complaint in the underlying action, Aff. of Joseph Powers, Esq. In Support of Defendant's Motion, Ex. B).

The CGL policy issued by Illinois Union to Bay State has an "Auto Exclusion" which excludes from coverage bodily injury claims arising from the use of a vehicle as defined in the exclusion (Illinois Union policy, Powers Aff., Ex. C, IU 09). A trailer, such as that in which Trella fell, is a vehicle defined in the exclusion. As defined in the exclusion, the term "[u]se includes operation and 'loading or unloading'" (*id.*, paragraph 2[g]). The exclusion applies even if the claim against the insured alleges negligence in the supervision, hiring or employment of others (*id.*).

USF commenced this action for declaratory judgment that (1) USF does not provide coverage for the second and third causes of action in the Trella claim; (2) that Illinois Union is obligated to defend and indemnify Bay State in the Trella action; and (3) Illinois Union must reimburse USF for the costs and disbursements it incurred to defend Bay State in the Trella action. Illinois Union moves to dismiss under CPLR 3211(a)(1) and (7), on the grounds that documentary evidence, in the form of Illinois Union's CGL policy and an August 10, 2007 letter sent to Bay Crane on USF's behalf, disposes of all matters raised in the complaint.

USF argues that the Auto Exclusion does not extend to claims for bodily injury where the injured person alleges that his injury arose from a violation of the New York Labor Law

(citing Lalomia v Bankers & Shippers Ins. Co., 35 AD2d 114 [2d Dept 1970]). In Lalomia and other cases relied upon by Illinois Union, courts held that general liability coverage was invoked to cover negligence claims when the insured's potential liability was not directly related to the use, maintenance, operation or use of a motor vehicle, even if the injury involved a motor vehicle. So in Lalomia, the insureds were sued for negligent entrustment of a motor vehicle to their 12 year-old child, and the court held that a homeowner's policy covered the claim made under the negligent entrustment theory, even if it would not have covered a claim arising from negligent use of the vehicle.

USF argues that Trella's claim against Bay Crane is analogous, in that he alleges that his injury arose from the negligent use and maintenance of the trailer in violation of Labor Law sections 200 and 241(6). Why a claim alleged under the Labor Law cannot be subject to the Auto Exclusion is not spelled out, but it appears that USF contends that the Labor Law claims allege negligent workplace supervision that is not directly related to use of the trailer.

Generally, a CGL policy provides coverage for bodily injury claims, even if made under the Labor Law. However, Trella's claim falls squarely within the scope of an express exclusion, and Illinois Union promptly disclaimed. USF fails to explain why the Auto Exclusion should not be enforced. It does

not contest that the trailer is an excluded vehicle, or that Trella was engaged in unloading cable from it. That Trella presses a statutory basis for his negligence claim does not vitiate the Auto Exclusion because "... it is the act giving rise to liability that is determinative, not the theories of liability alleged" (U. S. Fire Ins. Co. v N.Y. Marine and General Ins. Co., 268 AD2d 19, 23 [1st Dept 2000]). Moreover, the exclusion specifically applies to claims arising from the use of a trailer when the claim is couched as one for negligent supervision.

Finally, the complaint seeks a declaration that USF is not obligated to defend or indemnify Bay Crane in the underlying action. The only other party herein is Illinois Union, and once the complaint is dismissed as against it, there remains no case in controversy regarding USF's obligation to defend and indemnify Bay Crane. Accordingly, it hereby is

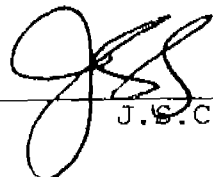
ORDERED that the motion by defendant Illinois Union to dismiss is granted, and the complaint is dismissed in its entirety; and it further is

ADJUDGED and DECLARED that defendant Illinois Union is not obligated to defend and indemnify Bay Crane in the underlying action, and Illinois Union is not obligated to reimburse USF for attorney's fees, costs and other expenses incurred by it in connection with the underlying action; and it further is

ORDERED that the Clerk of the Court shall enter judgment accordingly, with costs and disbursements to defendant as taxed.

Dated: January 7, 2009

ENTER:



J.S.C.
JANE S. SOLOMON

UNFILED JUDGMENT

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