

**Certain Lloyd's Underwriters at Lloyd's London v
Admiral Ins. Co.**

2009 NY Slip Op 31209(U)

May 15, 2009

Supreme Court, Queens County

Docket Number: 1276/07

Judge: Patricia P. Satterfield

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that the named insured under its applicable commercial general liability policy was "Rapid Rental & Supply Co., Inc."

A commercial general liability policy issued by defendant Admiral Insurance Company (defendant) to USG and certain other named entities, including "Rapid Rental, Inc.", was also in effect at the time of Khan's accident. Defendant denied coverage to Rapid Rental & Supply Corp. approximately one month after the third-party action was commenced. In the letter disclaiming coverage, defendant noted that it had previously disclaimed coverage to USG. The grounds given for disclaimer were the lack of timely notice of Khan's accident and policy exclusions relating to liability assumed in a contract and liability of an employer.

The Khan and third-party actions were settled for \$850,000.00, \$750,000.00 of which was to come from Rapid Rental & Supply Corp., and the remaining \$100,000.00 was to come from Bovis. The parties to the settlement discontinued with prejudice all claims, cross claims, and counterclaims asserted among them. However, Bovis & the owner of the site reserved the right, on their own behalf and that of their insurer, National Union Fire Insurance Company of Pittsburgh (National Union), to proceed against defendant to recover their defense and settlement costs. Indeed, they had already instituted suit against defendant (the National Union action) on the ground that they were additional insureds under defendant's aforementioned liability policy, and, therefore, that

defendant was obligated to indemnify and defend them in the Khan action. They won the suit, and defendant ultimately reimbursed National Union in the amount of \$165,000.00. Defendant now seeks summary judgment on its counterclaim to recover the \$165,000.00 from plaintiff. Defendant alleges that plaintiff was unjustly enriched by its reimbursement of National Union because plaintiff's policy insured against contractual indemnification claims, and Rapid Rental & Supply Corp. had contracted with defendant's insured, USG, to indemnify both USG and Bovis for any loss arising from its work or operations. Defendant argues that plaintiff was, therefore, primarily obligated to defend and indemnify Bovis, and should have paid the entire \$850,000.00 settlement and all defense costs itself.

Initially, it should be noted that defendant has taken the position that USG is the only one of its named insureds to be involved in the underlying lawsuits. Defendant seeks summary judgment dismissing the complaint on the ground that plaintiff cannot establish that Rapid Rental & Supply Corp. is the same entity as "Rapid Rental, Inc.," the entity defendant insured along with USG.

Defendant's contention is disingenuous. The deposition testimony of USG's insurance broker at the time, William Kloss, establishes that Kloss procured defendant's policy at USG's request, listing as the insureds those entities which USG told him were to be covered thereunder. Kloss further testified that he also

procured the policy that plaintiff issued, with the mistaken name "Rapid Rental & Supply Co., Inc." as the insured, when he learned that "Rapid Rental" was not owned by USG. The records of the New York Department of State, Division of Corporations, contain no listing for either Rapid Rental, Inc. or Rapid Rental & Supply Co., Inc. Moreover, the records list the actual name of USG as "Universal Services Group of L.I., Ltd.," not the "Universal Services Group, Ltd.," named in defendant's policy. Similarly, "USG Restoration" and "USG Realty Ltd.," also named in defendant's policy, are, in actuality, incorporated as "USG Restoration Corp." and "USG Realty, Inc." In short, Mr. Kloss was less than meticulous in identifying the actual insureds on the policies he obtained.

Furthermore, in a supporting affidavit, the owner of Rapid Rental & Supply Corp. stated that she had received a copy of defendant's policy after it was issued, and paid the premium to her insurance broker, Mr. Kloss. Kloss testified that such owner is the wife of a man he knew to be connected to USG's president. Importantly, defendant sent its disclaimer letter to "Rapid Rental & Supply Company [sic]," not "Rapid Rental, Inc.," to the address listed in the records of the Department of State for Rapid Rental & Supply Corp.

As previously indicated, the letter set forth several grounds for defendant's disclaimer of coverage, none of which was

that Rapid Rental & Supply Corp. was not a named insured.¹ Consequently, defendant has waived that claim (see *General Accident Ins. Group v Cirucci*, 46 NY2d 862 [1979]; *Syracuse Lighting Co. v Maryland Casualty Co.*, 226 NY2d 25 [1919]; *Adames v Nationwide Mut. Fire Ins. Co.*, 55 AD3d 513 [2008]; *Prus v Glencott Realty Corp.*, 10 AD3d 390 [2004]).

Generally, where two insurance policies having the same insured provide coverage for the same risk, concurrent coverage exists and the two carriers are considered coinsurers (see *Continental Cas. Co. v Rapid - American Corp.*, 80 NY2d 640, 655 [1993]; *National Union Fire Ins. Co. of Pittsburgh*, 248 AD2d 78, 84 [1998], *affd* 93 NY2d 983 [1999]; *Southgate Owners Corp. v Public Serv. Mut. Ins. Co.*, 241 AD2d 397, 398 [1997]; *Merchants & Business Men's Mut. Ins. v Savemart*, 213 AD2d 607, 610 [1995]; *B.K. Gen. Ctrs. v Michigan Mut. Ins. Co.*, 204 AD2d 584, 585 [1994]). Here, plaintiff and defendant both insured Rapid Rental against liability for bodily injury. Thus, plaintiff and defendant were coinsurers. While defendant argues that plaintiff's policy did not contain an "additional insured" provision while defendant's did, the fact that defendant's policy may have had broader coverage than plaintiff's does not alter their status as coinsurers (see *B.K. General Contrs.*, *supra*, at 585; *Continental Ins. Co. v Commercial*

¹ Hereinafter, the insured of both plaintiff and defendant shall be referred to as "Rapid Rental."

Union Ins. Co., 27 AD2d 333, 336 [1967])). Since plaintiff paid the full amount of the settlement on behalf of Rapid Rental, as well as all of its defense costs, it is entitled to recover from defendant one half of the total so expended (see *National Union Fire Ins. Co. of Pittsburgh*, *supra*, at 85; *Investors Ins. Co. of America v Hartford Fire Ins. Co.*, 233 AD2d 197 [1996]; *Merchants & Business Men's Mut. Ins.*, *supra*, at 610; *Zurich-American Ins. Cos. v Atlantic Mut. Ins. Cos.*, 139 AD2d 379, 387 [1988], *affd* 74 NY2d 621 [1989])).

In making the above determination, the court has rejected defendant's argument that plaintiff cannot seek contribution from it because it properly disclaimed coverage. As indicated above, defendant disclaimed coverage based on Rapid Rental's failure to give timely notice, and on two policy exclusions. Defendant is collaterally estopped from asserting the allegedly untimely notice, as it was determined in the National Union action that defendant had received timely notice of the underlying occurrence (*The Trustees of Congregation Shearith Israel in the City of New York, et al. v Admiral Ins. Co.*, Sup. Ct., NY County, October 7, 2005, Solomon, J., Index No. 003515/03; see *Buechal v Bain*, 97 NY2d 295, 303-304 [2001]; *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]; *Luscher v Arrua*, 21 AD3d 1005, 1007 [2005])). Furthermore, the two policy exclusions, one of which is identical in language to that contained in plaintiff's policy, are only applicable in the absence of an "insured contract," as defined therein. Since the subcontract

between Rapid Rental & USG is such an insured contract, the exclusions are inapplicable.

With respect to defendant's counterclaim, defendant concedes that Bovis was an additional insured under its policy, but not under plaintiff's policy. Thus, plaintiff and defendant were not coinsurers with respect to Bovis' indemnification and defense in the underlying Khan and third-party actions. Furthermore, defendant cannot be subrogated to Bovis' claims against Rapid Rental arising from Rapid Rental's subcontract agreement to indemnify Bovis, among others, for claims arising from the performance of its work, as those claims were released by Bovis in the settlement (see *Federal Ins. Co. v Arthur Anderson & Co.*, 75 NY2d 366, 372 [1990]).

As to defendant's claim that plaintiff was unjustly enriched by defendant reimbursing the National Union costs, to prevail on a claim for unjust enrichment, a party must show that: (1) the other party was enriched; (2) at that party's expense; and (3) that "it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421, [1972], cert denied 414 U.S. 829 [1973]; see *Sperry Crompton Corp.*, 8 NY3d 204, 215 [2007]; *Island Fed. Credit Union v Smith*, ___ AD3d ___, 2009 Slip Op 1776 [2nd Dept 2009]; *Old Republic Natl. Tit. Ins. Co. v Luft*, 52 AD3d 491 [2008]). Contrary to defendant's contention, plaintiff was not "required ... as a result of the insured contract

provision of its policy," to indemnify USG or Bovis for the claims asserted in the Khan & third-party actions. While it is true that the USG/Rapid Rental subcontract placed primary responsibility on Rapid Rental for all damages and costs arising from accidents occurring in the performance of its work, the obligations of an insurer and its insured are governed solely by the policy. Under the policy, plaintiff was required to defend and indemnify Rapid Rental with respect to the Khan and third-party claims, which it did.

Defendant's attorney attended the allocation of the settlement of the underlying actions, but voiced no objection. Bovis' contribution to the settlement was found by the referee in the National Union action to have been reasonable given the injury sustained by Khan and Bovis' potential liability for its own worksite negligence. Under the circumstances, including the additional obligation defendant bore with respect to Bovis which plaintiff did not, and considering that a contrary finding could induce future disclaimers by coinsurers and discourage prompt settlement of insured claims, plaintiff was not unjustly enriched.

Accordingly, plaintiff's motion for summary judgment is granted. Plaintiff is entitled to one half of the \$750,000.00 settlement cost, as well as one-half of its defense costs. Defendant's counterclaim is dismissed. Defendant's motion is denied in all respects.
Settle order.

J.S.C.