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

PRESENT: C E Ramos Justice

PART 52

Index Number : 100213/2008

ILLINOIS UNION INSURANCE COMPANY

vs.

ASSURANCE COMPANY OF AMERCA,

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 100213-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

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

Upon the foregoing papers, it is ordered that this motion

IS DISPOSED OF IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

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

Dated: 7/24/09

HON. CHARLES E. RAMOS 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:COMMERCIAL DIVISION
----------X
ILLINOIS UNION INSURANCE COMPANY,

Plaintiff,

Index No. 100213/08

-against-

ASSURANCE COMPANY OF AMERICA,

Defendant.
----------X

Charles Edward Ramos, J.S.C.:

Defendant, Assurance Company of America (Assurance), moves for summary judgment. Plaintiff Illinois Union Insurance Company (Illinois) cross-moves for the same relief.

Background

This is a dispute involving two insurance carriers seeking to avoid paying for litigation defense.[1] In September 2002, the insured, El Dorado Surgery Center (El Dorado), was sued by Victoria Cronnelly for breach of contract, breach of implied covenant of good fair and fair dealing, slander, intentional interference with contractual relations, intentional interference with prospective economic advantage, intentional misrepresentation, and negligent misrepresentation.

Illinois agreed to fully defend El Dorado under its policy and reserved its right to deny coverage. Illinois alleges that at the end of 2005, approximately three months before trial, it learned that El Dorado had a general liability policy with

[1] Illinois incurred costs of $517,734.77 by defending the insured, El Dorado Surgery Center in the underlying action.

Assurance and immediately sought a copy. Transcript, December 11, 2008, Page 18. In February 2006, a jury awarded Cronnelly $30,000 on the negligent misrepresentation count, which was subsequently paid by El Dorado. In May 2006, El Dorado advised Assurance that Illinois stopped paying defense costs approximately six months prior and that El Dorado had paid approximately $54,000 out of pocket and was assessed approximately $100,000 for outstanding bills. In July 2007, an Illinois claims representative reviewed and disputed the attorney rates applied in El Dorado's defense, and reduced the outstanding balance owed to it for defense costs to $32,903.70, which Assurance reimbursed to El Dorado.

In January 2008, Illinois filed this action seeking full reimbursement of the total amount expended on behalf of El Dorado ($517,734.77) from Assurance. Alternatively, it seeks equitable contribution of one-half of the defense costs plus interest.

Choice of Law

It is undisputed that California law applies to this matter. Where the parties' arguments reflect an assumption that one state's law applies, such implied consent to use a forum's law is sufficient to establish choice of law. *Tehran-Berkeley Civil & Environmental Engineers v Tippetts-Abbett-McCarthy-Stratton*, 888 F2d 239, 242 (2d Cir 1989). In addition, because both the Illinois and Assurance policies were issued to El Dorado in California, and El Dorado is a California entity with its principal place of business in California. See *Certain*

Underwriters at Lloyd's, London v Foster Wheeler Corp, 36 AD3d 17, 21-22 [2006], *affd*, 9 NY3d 928 (2007).

Summary Judgment

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact as to the claim or claims at issue. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Once the prima facie showing has been made, the party opposing a motion for summary judgment bears the burden of "produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact" *Amatulli v Delhi Constr. Corp.*, 77 NY2d 525 (1991).

Discussion

I. Estoppel and Waiver

In support of its motion for summary judgment, Assurance raises threshold issues. Namely that Illinois is estopped from seeking contribution or indemnification in this action because it assumed and controlled the insured's entire defense under an insufficient reservation of rights.

Illinois agreed to fully defend El Dorado in the underlying action, reserving its right to deny coverage specifically "for any amounts due under an employment contract or for punitive

damages to the extent those damages are not insurable," and to "the extent that any damages are attributable to any fraudulent, dishonest or criminal conduct." Letter to El Dorado from Illinois, February 3, 2004. Additionally, the reservation of rights provided a "catch all" provision to deny coverage based on grounds "other than those expressly set forth in this letter..." Id. Notably, Assurance fails to address this.

California and New York are consistent on the issue of estoppel and waiver, and therefore, the Court will apply New York law to this issue. *Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 2 AD3d 150, 151 [1st Dept 2003], *affd*, 3 NY3d 577 [2004]; *SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 354 [1st Dept 2004]. New York courts apply principles of equitable estoppel where an insurer, although not obligated to provide coverage, undertakes the defense of the case and fails to assert policy defenses or reserve its privilege to deny coverage, and in reliance, the insured suffers the detriment of losing the right to control its own defense. In such circumstances, though coverage may not exist, the insurer will not be heard to say so. See *Albert J. Schiff Associates, Inc. v Flack*, 51 NY2d 692 (1980); *O'Dowd v American Sur. Co. of N.Y.*, 3 NY2d 347 (1957); *Gerka v Fidelty & Cas. Co.*, 251 NY 51, 57 (1929). However, Assurance fails to cite any authority that establishes that the reservation of rights language contained in Illinois' letter to El Dorado on February 3, 2004 was not an adequate reservation of rights.

Assurance argues that, while estoppel is based on prejudice,

such prejudice is implied as a matter of law where the insurer has complete control of the case. *Albert J. Schiff Associates*, 51 NY2d at 699. Although the theory is correct, it is inapplicable here. As in the several cases Assurance cites for this principle, the invocation of equitable estoppel requires prejudice suffered by the party seeking to invoke it (here, the insured). Assurance fails to raise a triable issue that it suffered prejudice as a result of Illinois' control of the defense, and the insured, El Dorado, is not a party to this action to raise the issue itself. Therefore, the argument fails.

Waiver is the voluntary and intentional relinquishment of a known right. *Cent. Gen. Hosp. v Chubb Group of Ins. Cos.*, 90 NY2d 195, 201 (1997). Any assertion that Illinois waived its right to indemnification and/or contribution assumes that Illinois had knowledge of the Assurance policy, and voluntarily chose to defend the insured without reserving its rights to seek such relief. Illinois alleges that it learned of Assurance's policy in late 2005, approximately three months before trial, and immediately sought a copy of the policy. No evidence has been submitted by Assurance to the contrary, and thus no waiver argument can be supported by the current record.

II. Duty to Defend

It is well established that an insurer's duty to defend is broader than its duty to indemnify, and arises whenever the allegations of the complaint create a potential for indemnity under the policy. *GGIS Ins. Services, Inc. v Superior Court*, 168

Cal App 4th 1493 (2d Dist 2008), *petition denied*, 2009 Cal LEXIS 1321. Furthermore, if an insurer is bound to defend an action based on the assertion of one covered claim, it must defend the entire action even though some portions of it involve non-covered claims. *County of San Bernardino v Pac. Indem. Co.*, 56 Cal App 4th 666, 689 (4th Dist 1997), *petition denied*, 1997 Cal LEXIS 6282. Although an insurer owing a duty to defend must defend the entire underlying action, allocation of defense costs may later be apportioned in certain situations involving multiple insurers. Id.

It should be noted that Assurance repeatedly makes the argument that there is an "unusual provision"[2] in Illinois' policy in which Illinois agreed to defend uncovered claims as part of "Covered Loss" as long as one covered claim is also alleged. However, as cited above, this provision is clearly consistent with the common law in California, and is thus not "unusual" at all.

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[2] J. ALLOCATION:

In the event any of the Insureds in a Claim incur both Loss that is covered by the Policy, either because such Claim includes both covered and uncovered matters or because such Claim is made against both covered and uncovered parties, then coverage will be allocated as follows:

1. 100% of Costs, Charges, Expenses incurred by such Insureds on account of such Claim will be allocated as covered Loss; and

2. Any remaining loss incurred by such Insureds on account of such Claim will be allocated by the parties between covered Loss and uncovered Loss using all reasonable efforts based upon the legal liabilities of each of the parties to such matters.

III. Liability of Defense Costs Under the Policies

Illinois Union issued an Employment Practices (EPC) and Directors and Officers Liability (D&O) policy to El Dorado, effective January 3, 2003 to January 3, 2004, with a $1 million limit under each coverage part. Section A, titled "Insurance Clause," of the EPC section delineates Illinois' coverage obligation: "[Illinois] shall pay on behalf of the Insured's Loss resulting from any Claim first made during the Policy Period for a Wrongful Act."[3] A "Claim" is defined in relevant part in the EPC section as "any written or oral demand for damages or other relief against any of the Insureds" that is "brought by or on behalf of an Employee." The EPC section defines "employees" in relevant part as "all persons who were, now are or shall be"

> c) any individuals who are leased or are contracted to perform work for the Company, or are independent contractors for the Company, but only if such individuals perform work or services solely for or on behalf of the Company.[4]

Thus, to qualify as an "Employee" under the policy, the plaintiff in the underlying case, Victoria Cronnelly, had to be performing services solely for El Dorado. According to her complaint, she was working both for El Dorado and Marshall

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[3] A "Wrongful Act," in relevant part, means any actual or alleged:

c) breach of an actual or implied employment contract; or
...
h) defamation, libel, slander ...
k) wrongful infliction of emotional distress, mental anguish or humiliation.

[4] Emphases are supplied throughout this decision unless otherwise noted.

Hospital, which excludes her from coverage. However, the policy provides coverage for an "Employee" that "shall be" working solely for El Dorado. Litigation in this action is ongoing and discovery has not determined whether Cronnelly could be categorized as working solely for El Dorado. Nevertheless, because the allegations Cronnelly raised in the complaint potentially are covered under the EPC section, Illinois' defense obligation for the entire Cronnelly action is triggered, subject to its reservation of rights to ultimately deny coverage. Therefore, Illinois is entitled to reimbursement from Assurance for certain defense costs where allegations are potentially covered in whole or in part by the Assurance policy, or reimbursement from the insured where allegations are found to not be covered in any policy. See *Buss v Superior Court*, 16 Cal 4th 35 (Cal 1997).

The D&O section of Illinois' policy states that Illinois "shall pay on behalf of the Company Loss resulting from any Claim first made against the Company during the Policy Period for a Wrongful Act," except:

> 1. [Illinois] shall not be liable to make any payment under this Coverage Section in connection with any Claim:
>
> n) based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving any employment or employment related matters brought by or on behalf of a director, officer, or employee, including any voluntary, seasonal, temporary, leased or independent contracted employee of the Company. Exclusion C(1)(n).

It is clear from the above exclusion that coverage is not afforded to Cronnelly under the D&O section of the Illinois policy.

Assurance issued a general liability policy to El Dorado, effective March 1, 2002 until canceled, with a $1 million per occurrence limit. Specifically, Coverage B of the policy affords El Dorado coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'personal and advertising injury.'" The Assurance policy's definition of "personal and advertising injury" includes "[o]ral or written publication of material that slanders or libels a person." By its plain language, the Assurance policy potentially covers the Cronnelly slander claim, and thus triggers Assurance's duty to bear the defense costs afforded to this claim.

III. Primary vs Excess Insurance Coverage

A final pivotal issue in this matter is whether the language of the applicable policies are primary or excess. Insurance policies are construed under the same rules that govern the interpretation of contracts. Accordingly, a policy must be interpreted to give effect to the mutual intent of the parties at the time of contracting, and such intent is ascertained, if possible, from the "clear and explicit" language of the contract. *St. Paul Mercury Ins. Co. v Frontier Pacific Ins. Co.*, 111 Cal App 4th 1234, 1243 (4th Dist 2003), *rehearing denied*, 2003 Cal App LEXIS 1402, *petition denied*, 2003 Cal LEXIS 9883. If contractual language is clear and explicit, it governs. Id. On

the other hand, when policy language is ambiguous, rules applicable to resolving ambiguity control. Id.

There is a clear distinction between primary and excess insurance coverage. Primary coverage is insurance coverage whereby liability attaches immediately upon the happening of the occurrence that gives rise to liability. *American Casualty Co. v General Star Indemnity Co.*, 125 Cal App 4th 1510, 1521 (2d Dist 2005). Primary insurers generally have the primary duty of defense. Id. Excess or secondary coverage is coverage whereby, under the terms of the policy, liability attaches only after a predetermined amount of primary coverage has been exhausted. Id.

In making a determination of whether an insurance policy provides primary or excess coverage, and of the priority of liability of policies, courts examine the provisions of all policies involved. *Scottsdale Ins. Co. v State Farm Mutual Automobile Ins. Co.*, 130 Cal App 4th 890, 904 (2d Dist 2005), *rehearing denied*, 2005 Cal App LEXIS 1175, *petition denied*, 2005 Cal LEXIS 11644.

"Other insurance"[5] clauses become relevant only where several insurers insure the same risk at the same level of coverage. *Travelers Casualty & Sur. Co. v Am. Equity Ins. Co.*, 93

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[5] Most insurance policies contain "other insurance" clauses that attempt to limit the insurer's liability to the extent that other insurance covers the same risk. Such clauses attempt to control the manner in which each insurer contributes to or shares a covered loss. Courts generally honor the language of other insurance clauses when no prejudice to the interests of the insured will ensue. *Travelers Casualty & Sur. Co. v Am. Equity Ins. Co.*, 93 Cal App 4th 1142, 1149 (1st Dist 2001).

Cal App 4th 1142, 1150 (1st Dist 2001).

The Assurance policy is clearly primary, by its terms, to the extent that it covers certain of Cronnelly's claims. It states:

> 5. Other Insurance
> If other valid and collectible insurance is available to the insured for a loss we cover ... our obligations are limited as follows:
>
> a. Primary Insurance
> This insurance is primary except when b. below applies.[6] If this insurance is primary, our obligations are not affected unless any of the insurance is also primary.

Illinois' policy contains an excess clause, which provides in part:

> C. EXCLUSIONS
>
> 2. "To the extent it is insured under any other existing valid policy, whether such other insurance is stated to be primary, excess, contingent or otherwise ... provided, however, this exclusion shall not apply to the amount of Loss which is in excess of the amount of any deductible and the limit of liability of such other policy where such Claim is otherwise covered by this Coverage Section."

This language makes it apparent that the Illinois policy is excess only to the extent that El Dorado has coverage under another policy covering the same type of claims as the claims

[6] It is undisputed that no exception under 5(b) are applicable, and therefore it will not be addressed.

covered by the Illinois policy. As noted above, "other insurance" claims are only applied when coverage is concurrent or overlapping. Here, the slander claim is the only claim fitting this description, and thus, the Illinois policy is excess to this claim only. Otherwise, both policies are primary covering different losses of the insured.

IV. Prejudgment Interest

Illinois seeks prejudgment interest on any additional funds that are to be reimbursed to Illinois by Assurance as a result of this motion. CPLR 5001 provides that "[i]n an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion." Here, to Illinois' credit, it properly protected the interests of the insured by not immediately disputing its defense obligation. However, it failed to properly investigate the existence other valid insurance policies, the discovery of which may have obviated the need to litigate this matter. It follows that the equities do not justify an award of interest in this action. All other arguments were considered and are without merit. Accordingly, it is

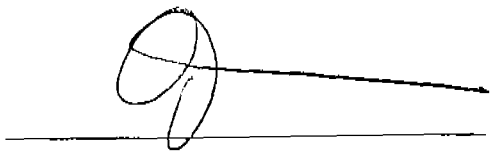
ORDERED that defendant's motion for summary judgment is hereby granted, in part, and denied, in part, as indicated above; and it is further

ORDERED that plaintiff's motion for summary judgment is hereby granted, in part, and denied, in part, as indicated above; and it is further

ORDERED that the action shall continue.

Settle order.

Dated: July 24, 2009



J.S.C.

HON. CHARLES E. RAMOS