Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IA Part 12
Justice

UNITED STATES FIRE INSURANCE COMPANY, et al. x

- against -

KNOLLER COMPANIES, INC., et al.

x

Index Number 3238 2005

Motion Date September 16, 2009

Motion Cal. Number 28

Motion Seq. No. 5

The following papers numbered 1 to 4 read on this motion by the plaintiffs for leave to reargue their opposition to that branch of the defendants' motion which was for summary judgment declaring that plaintiff United States Fire Insurance Company (USF) and defendant Hartford Casualty Insurance Company are co-insurers of plaintiff Gilman Construction Co.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Reply Affidavits	3
Memorandum of Law	4

Upon the foregoing papers it is ordered that leave to reargue is granted. Upon reargument, the court adheres to its prior determination.

The facts of this case are more fully given in this court's decision and order (one paper) dated May 29, 2009. On or about March 3, 1998, Federated Corporate Services, Inc., acting as the agent of plaintiff Federated Department Stores, entered into a contract with plaintiff Gilman whereby the latter agreed to renovate a Macy's store located at 155 Glen

Cove Road, Carle Place, New York. Plaintiff Gilman subsequently subcontracted HVAC work to defendant Knoller Companies, Inc., which, in turn, sub-subcontracted work involving the fabrication and installation of ducts to Ashlor Mechanical Corp. Plaintiff Gilman also subcontracted carpentry work to Crosstown Interior Contracting, Inc. (Crosstown), which agreed to obtain liability insurance naming Federated Corporate Services, Inc. and Gilman as additional insureds.

Crosstown obtained a comprehensive general liability policy from plaintiff USF effective from June 30, 1998 to June 30, 1999, which made Gilman an additional named insured. The USF policy further provided that the insurance was excess to: "Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement."

Defendant Knoller also agreed to obtain liability insurance naming Federated Corporate Services and Gilman as additional insureds. Defendant Hartford issued a liability policy to defendant Knoller, and a certificate of insurance named Gilman as an additional insured under the Hartford policy. The policy also made additional insureds "any person or organization with whom you agreed, because of a written contract or agreement or permit to provide insurance such as is afforded under this policy ...." Section 24 of the policy provided in relevant part: " ... b. Excess Insurance. This insurance is excess over any of the other insurance whether primary, excess, contingent or on any other basis: (1) That is Fire, Extended Coverage, Builder's Risk, Installation Risk, or similar coverage for 'your work' ...." Section 25 of the Hartford policy provided in relevant part: "This insurance is excess over any other insurance, whether primary, excess, contingent, or on any other basis: ... (4) When any of the named insureds under this coverage part are additional insureds under a commercial general liability policy or similar insurance of another party."

On or about November 10, 1998, Vincent DeVita, an employee of Ashlor Mechanical, allegedly sustained personal injury on the job when he stepped into an opening in the floor which had been made to install electrical equipment. Crosstown allegedly had the responsibility of placing plywood over the opening, but had allegedly neglected to do so. On or about December 11, 1998, DeVita brought an action for personal injury against Macy's East, Inc. and Gilman in the New York State Supreme Court, County of Queens (*DeVita v Macy's East, Inc.,* Index No. 27056/98*).* On or about June 22, 2000, Federated Corporate Services, Inc. and Gilman began a third-party action against Knoller for, inter alia, contribution (*Federated Corporate Services, Inc. v Knoller Companies, Inc.,* Index No. 350451/00). On or about October 2, 2007, Knoller began a third third-party action against Crosstown for contribution and indemnification (*Knoller Companies, Inc. v Crosstown Interior Contracting, Inc.*, Index No. 27056/98).

On or about February 10, 2005, the plaintiffs began this action which seeks, inter alia, a judgment declaring, inter alia, that the Hartford policy provides primary coverage to Federated and Gilman. On February 18, 2009, the plaintiffs submitted a motion for, inter alia, summary judgment declaring that plaintiff Federated Department Stores and/or plaintiff Gilman are additional insureds under the policy issued by defendant Hartford to defendant Knoller, and defendant Hartford and defendant Knoller submitted a motion for, inter alia, summary judgment declaring that they have no obligation to defend or indemnify Macy's East, Inc. By decision and order dated May 29, 2009, this court, inter alia, (1) granted that branch of the plaintiffs' motion which was for summary judgment declaring that Gilman is an additional insured under the Hartford policy, (2) granted that branch of the plaintiffs' motion which sought summary judgment declaring that Federated is an additional insured under the Hartford policy, (3) denied that branch of the defendants' motion which was for summary judgment declaring that they have no obligation to defend or indemnify Macy's East, Inc., (4) denied that branch of the plaintiffs' motion which was for summary judgment on the cause of action asserted against defendant Knoller for breach of contract to procure insurance, and (5) granted that branch of the defendants' motion which was for summary judgment declaring that plaintiff USF and defendant Hartford are co-insurers of defendant Gilman.

On September 16, 2009, the plaintiffs submitted the instant motion seeking to reargue their opposition to that branch of the defendants' motion which was for summary judgment declaring that plaintiff USF and defendant Hartford are co-insurers of plaintiff Gilman Construction Co. The plaintiffs contend that the court erred when it did not find that Hartford was a primary insurer and USF only an excess insurer. Leave to reargue is warranted since the plaintiffs have attempted to show that "the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." (*Schneider v Solowey*, 141 AD2d 813; *see*, CPLR 2221[d]; *Grassel v Albany Med. Ctr. Hosp*., 223 AD2d 803; *William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22.)

Unfortunately for plaintiff USF, its motion to reargue gave defendant Hartford an opportunity to clarify which of the excess insurance clauses within its voluminous policy applies to this case. An endorsement to the Hartford policy captioned "Amendment of Other Insurance Condition (Occurrence Version)" provides in relevant part: "Paragraph 4.b of the Other Insurance Condition (Section IV – Commercial General Liability Conditions) is replaced by the following: 4. Other Insurance [:] b. Excess Insurance [:] This insurance is excess over: ... (2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement." The court previously found that Gilman is an additional insured under the USF policy, making amended clause 4.b(2) in the Hartford policy the relevant and dispositive term. Plaintiff USF's reply papers say nothing

about this relevant and dispositive term in the endorsement captioned "Amendment of Other Insurance Condition (Occurrence Version)." While USF zealously attempted to demonstrate here that clauses relied upon by the court in its previous decision do not apply (an effort that could have been made on the original motion), the points the insurer raises are moot, since USF cannot evade the impact of the Hartford amended endorsement containing an excess insurance clause identical to the one in the USF policy.

"[W]here there are multiple policies covering the same risk, and each generally purports to be excess to the other, the excess coverage clauses are held to cancel each other out and each insurer contributes in proportion to its limit amount of insurance ...." (*Osorio v Kenart Realty, Inc.*, 48 AD3d 650, 652.) The USF policy and the Hartford policy contained identical clauses attempting to shift the coverage the policies afforded to Gilman to the excess level, and the conflicting clauses thereby cancelled each other out.

As this court previously held, USF and Hartford are insurers on the same level in regard to Gilman.

Dated: October 15, 2009

J.S.C.