DaimlerChrysler Ins. Co. v Universal Underwriters Ins. Co.
2010 NY Slip Op 30775(U)
March 31, 2010
Supreme Court, New York County
Docket Number: 601238/008
Judge: Louis B. York

[* 1]

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

PRESENT: LOUIS B. YORK J.S.C. PART 2

Index Number : 601238/2008

DAIMLERCHRYSLER INC. CO.

VS

UNIVERSAL UNDERWRITERSINS. CO.

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

UNFILED JUDGMENT

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

Dated: 3/31/10

LOUIS B. YORK 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 2

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DAIMLERCHRYSLER INSURANCE COMPANY (now known as Chrysler Insurance Company), individually and as subrogee of COUNTRY IMPORTED CAR CORP.,

Index No. 601238/08

Plaintiff,

-against-

UNIVERSAL UNDERWRITERS INSURANCE COMPANY (now known as UUIC),

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LOUIS B. YORK, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

The plaintiff DaimlerChrysler Insurance Company (Chrysler Insurance) moves, pursuant to CPLR 3212, for an order granting summary judgment in its favor against the defendant Universal Underwriters Insurance Company (Universal Insurance), and dismissing any counterclaims (motion sequence number 001). Universal Insurance moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint, and granting summary judgment on the counterclaim (motion sequence number 002).

Both the plaintiff and the defendant are insurance companies. Chrysler Insurance's subrogor, Country Imported Car Corp. (Country Imported) is a Mercedes Benz new car dealership. The parties have made a joint submission of undisputed facts. The following is taken from that joint submission and the exhibits.

Mercedes Benz had in place a program which provided dealers with loaner vehicles to

loan to customers as temporary substitute vehicles while the customer's vehicles were being serviced. The plaintiff Chrysler Insurance issued its policy of automobile insurance to Mercedes Benz, covering the loaner vehicles, including as a named insured Country Imported. Country Imported also had in place a garage-keepers automobile policy issued by the defendant Universal Insurance. The parties have not informed the court of the dollar limits of their coverage.

A loaner vehicle was provided by Country Imported, to one Todd Padavona. Mr. Padavona is a convicted felon who testified, in sum and substance, that he was a personal friend of the owner of Country Imported and that over an extended period, while "waiting for a car" he drove a series of loaner vehicles. The subject loaner car was involved in a serious crash with another vehicle. The loaner was being driven by Gladys Rodriquez, a friend of Mr. Padavona. Ms. Rodriquez was convicted of operating the loaner while her ability was impaired by alcohol. Mr. Padavona, as a front-seat passenger, was seriously injured and sued the drivers of both vehicles, and Country Imported. Although both Chrysler Insurance and Universal Insurance filed answers on behalf of Country Imported, the underlying personal injury lawsuit was defended by Chrysler Insurance. The lawsuit resulted Country Imported settling with Mr. Padavona for the total sum of $500,000, with Chrysler Insurance contributing $325,000 and Universal Insurance contributing $175,000.

Chrysler Insurance's complaint against Universal Insurance sets forth a total of four causes of action seeking full reimbursement for defense costs and the $325,000 it contributed to the settlement. Universal Insurance's answer counterclaims for reimbursement of its $175,000 contribution to the settlement.

The "other insurance" provision of the Chrysler loaner vehicle policy (Exhibit A to the joint submission at section IV 5. d.) provides:

> When this Coverage Form and any other Coverage Form or policy covers on the same basis, either excess or primary, we will pay only our share. Our share is the proportion that the Limit of Insurance of our Coverage Form bears to the total of the limits of all the Coverage Forms and policies covering on the same basis.

The Universal Insurance garage-keepers policy (Exhibit C to the joint submission), at page six provides:

> OTHER INSURANCE- Unless stated otherwise in a Coverage Part,WE will pay only the amount of the covered LOSS or INJURY in excess of the amount due from any other insurance, whether it is collectible or not.

In support of its motion for summary judgement, the defendant Universal Insurance argues that its policy clearly and unambiguously states that it is excess, and that the Chrysler Insurance policy unambiguously states that it is primary. Universal Insurance also urges that Chrysler Insurance is precluded from disclaiming coverage because a March 2008 agreement (Exhibit H to the submission) between Chrysler Insurance and Universal Insurance provides that each insurer is subrogated to any rights Country Imported has against the other insurer, and that any disclaimer by Chrysler Insurance against a claim by Country Imported, is untimely under Insurance Law § 3420 (d).

In support of its motion for summary judgment, the plaintiff Chrysler Insurance argues that the claims in the underlying personal injury action are unambiguously excluded from coverage under its policy because the driver was under the influence of alcohol, and because the vehicle was not rented to Mr. Padavona for service loaner purposes. It is also argued that Insurance Law § 3420 (d) does not apply to claims for indemnification between insurers.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373 [2005];

Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.

The court will first examine the terms of the two policies, before turning to the effects of Insurance Law § 3420 (d), Ms. Rodriquez's conviction, and the mystery surrounding a loaner car being given by Country Imported to Mr. Padavona.

A policy should be interpreted based on "common speech" (*Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398 [1983]) and "the reasonable expectation and purpose of the ordinary businessman when making an ordinary business contract" (*General Motors Acceptance Corp. v Nationwide Ins. Co.*, 4 NY3d 451, 457 [2005] [internal quotation marks and citation omitted]). In order to determine the priority among policies, the court must review and consider the provisions of all of the relevant policies at issue (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 716 [2007]). Here, it is undisputed that the Chrysler Insurance, and the Universal Insurance policies are not true excess policies, but primary policies that, under certain circumstances, purport to shift loss to other available insurance (*Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140 [1st Dept 2008])

Generally, where different insurers provide coverage for the same interest, and against the same risk, concurrent coverage exists (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 223 [2002]). In addition, where there are multiple policies covering the same risk, and each policy 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 of insurance (*Federal Ins. Co. v Atlantic Natl. Ins. Co.*, 25 NY2d 71 [1969]). "(A)n insurance policy which purports to be excess coverage but contemplates contribution with other excess policies or does not by the language used negate that possibility must contribute ratably with a similar policy, but must be exhausted before a policy which expressly negates contribution with other carriers, or otherwise manifests that it is intended to be excess over other excess policies" (*State Farm Fire & Cas. Co. v LiMauro*, 65 NY2d 369, 375-376 [1985]; *Liberty Mut. Ins. Co. v Hartford Ins. Co. of Midwest* 25 AD3d 658 [2d Dept 2006])

Excess insurance can occur by construing the "other insurance" clauses, if one policy is interpreted so that coverage attaches only after others are exhausted. The excess insurance situation may also arise in situations where, as here, there are multiple policies available with respect to a particular risk. In this situation, the policies' other insurance clauses may determine which policy will be first to respond. Alternatively, the policies may be required to contribute on a pro-rata basis, or on an equal share basis. This occurs where the multiple policies contain other insurance clauses purporting to make their policy excess to all other available insurance, in which case the clauses cancel each other. However, the best test is to determine which policy is closest to the risk involved in the loss, and to hold that policy primarily liable, with the other policy being excess (1-2 Appleman on Insurance Law and Practice § 2.16).

The Chrysler Insurance loaner policy could be interpreted as closest to the risk involved in a loaner car collision. However, to the extent that the Chrysler Insurance and the Universal Insurance policies cover the same loss and the same insured, it is not clear that the coverage provided under the Universal Insurance policy (garage-keepers) is excess to the coverage provided under the Chrysler Insurance policy (loaner vehicles). In reading the papers, the court

stumbled onto Universal Insurances's endorsement number 093 (Exhibit C to the joint submission at 116) which seems to exclude from coverage a temporary substitute auto. Upon contacting the parties, in order to obtain their views regarding the effect of endorsement number 093, the court learned that the parties agree that, although the endorsement appears in the copy of Universal Insurance's policy, the endorsement was never purchased by the insured Country Imported. This failure to purchase the endorsement is significant in that it indicates that the Universal Insurance's garage-keepers policy offers primary insurance on a temporary substitute auto. Therefore, the defendant Universal Insurance is not entitled to a judgement declaring that its policy is excess to Chrysler Insurance's policy.

The Chrysler Insurance policy was designed to provide primary insurance for Mercedes Benz and thus, after finding that Country Imported was a named additional insured under this policy, it naturally follows that coverage of Country Imported was also primary (*Handelsman v Sea Ins. Co.*, 85 NY2d 96, 101 [1994]; *Lavanant v General Acc. Ins. Co. of Am.*, 79 NY2d 623, 629 [1992]). No other common-speech meaning can be attributed to Chrysler's other insurance provisions in light of the endorsement.

The general rule of ratable contribution applies unless "its use would effectively deny and clearly distort the plain meaning of the terms of the policies of insurance" (*Lumbermens Mut. Cas. Co. v Allstate Ins. Co.*, 51 NY2d 651, 655 [1980]). "Whether there will be such distortion turns on consideration of the purpose each policy was intended to serve as evidenced by both its stated coverage and the premium paid for it, as well as upon the wording of its provision concerning excess insurance" (*State Farm Fire & Cas. Co. v Li Mauro*, 65 NY2d 369, 374 [1985]).

I conclude that Chrysler Insurance and Universal Insurance, who both contracted for

primary coverage, must provide it (*Jefferson Ins. Co. of N.Y. v Travelers Indem. Co.*, 92 NY2d 363, 372 [1998]). Chrysler Insurance and Universal Insurance, as primary co-insurers, must share dollar-for-dollar in covering the $500,000 loss. Both policies have similar provisions as to what constitutes their share. As both the Chrysler and the Universal policies had a limit of primary auto coverage exceeding the $ 500,000 loss, and they were the only two insurers that provided primary coverage in this case, each covers one half of the loss.

Turning to the issue of whether or not the plaintiff Chrysler Insurance is precluded from disclaiming coverage, Insurance Law § 3420 (d) (2) provides:.

> If under a liability policy issued or delivered in this state, an insurer shall disclaim liability or deny coverage for death or bodily injury arising out of a motor vehicle accident or any other type of accident occurring within this state, it shall give written notice as soon as is reasonably possible of such disclaimer of liability or denial of coverage to the insured and the injured person or any other claimant.

Insurance Law § 3420 (d) (2) requires that an insurer intending to disclaim liability under a liability policy, give prompt written notice of such disclaimer of liability or denial of coverage to the insured, and any other claimant. Contrary to the defendant Universal Insurance's assertion, New York courts have consistently held that Insurance Law § 3420 (d) is not applicable to a request for contribution between co-insurers (*American Guar. & Liab. Ins. Co. v State Natl. Ins. Co., Inc.*, 67 AD3d 488 [1st Dept 2009]; *J.T. Magen v Hartford Fire Ins. Co.*, 64 AD3d 266 [1st Dept], *lv denied* 13 NY3d 889 [2009]; *Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins. Co.*, 27 AD3d 84 [1st Dept 2005]; *Top Mkts. v Maryland Cas.*, 267 AD2d 999 [4th Dept 1999]).

Turning to the effect of the March 2008 agreement entered into between Universal Insurance and Chrysler Insurance, because Universal Insurance is not seeking reimbursement from a third-party wrongdoer, the doctrine of subrogation is inapplicable. The contract of

settlement an insurer enters into with the insured, cannot affect the rights of another insurer who is not a party to it. Instead, "whatever obligations or rights to contribution may exist between two or more insurers of the same event flow from equitable principles" (*Maryland Cas. Co. v W.R. Grace & Co.*, 218 F3d 204, 211 [2d Cir 2000]).

Turning to the effect of Ms. Rodriquez's intoxication, Insurance Law § 5103 (b) provides that an insurer may exclude from coverage a person who:

> (2) Is injured as a result of operating a motor vehicle while in an intoxicated condition or while his ability to operate such vehicle is impaired by the use of a drug within the meaning of section eleven hundred ninety-two of the vehicle and traffic law.

Here, Chrysler Insurance is not seeking to exclude from coverage a person who was injured while her ability to operate the vehicle was impaired. Rather, Chrysler Insurance is improperly seeking to exclude from coverage Country Imported. Moreover, the person injured was Mr. Padavona, not the intoxicated driver. Therefore, Chrysler Insurance may not, in an action by Mr. Padavona against Country Imported, disclaim based on Ms. Rodriquez's conviction for drunk driving.

By statute, New York requires each automobile policy to cover the named insured for any loss or damage occasioned by "any person operating or using [the vehicle] with the permission, express or implied, of the named insured" (Insurance Law § 3420 [e]). Therefore, an insurer covering a permissive user under its policy, in explicitly providing for such coverage, should not be surprised to pay claims that it covered.

Turning to the issue of whether or not the subject vehicle was a loaner, the court finds that the vehicle qualified as a covered loaner because the uncontradicted testimony of Mr. Padavona indicates that the car was temporarily provided to him while he "waited for a vehicle." Mr.

Padavona also testified (Exhibit J at 42) that he never: picked out a new car; signed any paper work; put down a deposit; or completed a purchase. Nevertheless, as nebulous as the assertion by Mr. Padavona is, it is supported by the testimony of a Country Imported employee, and it is the only proof before the court. Accepting as true Mr. Padavona's uncontradicted claim that he was "waiting for a car," the subject loaner falls within the definition of a loaner vehicle in Chrysler's policy.

Accordingly it is

ORDERED that the motion by DaimlerChrysler Insurance Company, (now known as Chrysler Insurance Company) is granted, and the motion by Universal Underwriters Insurance Company (now known as UUIC) is denied; and it is further

ORDERED, ADJUDGED AND DECLARED that the parties contribute one half jointly to the defense costs (amount to be determined), and indemnification ($250,000 each) of Country Imported in the underlying personal injury action; and it is further

ORDERED that within 30 days of service of a copy of this order with notice of entry, Universal Underwriters Insurance Company (now known as UUIC), pay the sum of $75,000 to the defendant DaimlerChrysler Insurance Company, (now known as Chrysler Insurance Company); and it is further

ORDERED the issue of the amount of the defense costs, is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this portion of the motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or

receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet (copies available in Rm 119 at 60 Centre Street, and on the Court's website), upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

Dated: 3/31/10

ENTER:

J.S.C.

LOUIS B. YORK
J.S.C.