

**Forest City Daly Hous. Mgt., LLC v Zurich Am. Ins.
Co.**

2010 NY Slip Op 33183(U)

November 9, 2010

Supreme Court, New York County

Docket Number: 114254/08

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. LOUIS B. YORK PART 2
Justice

-----X
FOREST CITY DALY HOUSING MGMT., LLC and
BRYANT LANDING OF ROSLYN, LLC,

Plaintiffs,

-against-

Index No. 114254/08
Motion Date _____
Motion Seq. No. 001
Motion Cal. No. _____

ZURICH AMERICAN INSURANCE CO., and
VIRGINIA SURETY CO., INC., (pertaining to an under-
lying claim entitled Timothy Kapler v Kajima Construction
Services, et al),

Defendants.

-----X
The following papers, numbered 1 to _____ were read on this motion for Summary Jgmt.

PAPERS

NUMBERED
Notice of Motion/ Order to Show Cause --- Affidavits --- Exhibits _____

Answering Affidavits --- Exhibits _____

Replying Affidavits _____

Cross-Motion: [] Yes [] No

This motion for summary judgment in this declaratory judgment action was instituted as the result of an underlying motion for summary judgment commenced by one Timothy Kapler.

Kapler, an employee of Pcter Scalamandre & Sons ("Scalamandre") was injured on a construction project while operating a backhoe when its window fell on him causing severe injuries.

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

The owners instant plaintiffs Forest City Daly Housing Management, LLC [“Forest City”] and Bryant Landing of Roslyn, LLC [“Bryant”] hired Kajima Construction services [“Kajima”] as the general contractor for the project. Kajima entered into a subcontract with Scalamandre, Kapler’s employee.

Kapler instituted the underlying action in New York County, alleging that the owners were liable for his injuries. The owners then brought a third-party action against Scalamandre alleging common-law contribution and indemnification, contractual indemnification and breach of contract.

Scalamandre was issued a Commercial General Liability Insurance Policy consisting of \$1 million coverage per occurrence by Virginia Surety Company, Inc. (“Virginia Surety”), which added Forest City and Bryant as additional insureds. Scalamandre also had an excess policy with National Casualty Company of \$20 million for each occurrence. It is assumed that Kajima also has an excess policy, but at the time that this motion was made, discovery had not yet revealed the extent or existence of the excess policy. The Court notes that Kajima did not dispute that it had such an excess policy.

Both the general contract between Kajima and the owners and the subcontract between Kajima and the subcontractor Scalamandre required Kajima and Scalamandre respectively to defend and indemnify Forest City and Bryant and to add them as primary additional insureds without contribution from their primary insurers.

After this action was brought, Virginia Surety offered to assign the law firm representing Scalamandre to represent the plaintiffs, provided plaintiffs discontinued their third-party action against Scalamandre. According to each of the defendants insurance policies, they would share the cost of representing plaintiffs dollar for dollar until it exhausted their policies. Nevertheless, Zurich argues that in order for it to indemnify the plaintiffs, Virginia Surety had to first exhaust its \$1 million dollar maximum, after which the \$500,000 deductible in the Zurich policy had to be exhausted before it would start to pay off on its \$2 million policy, and provided that the plaintiffs agreed to a stay of any claims against Scalamandre until there was a final resolution of the action in the underlying personal injury lawsuit. It agreed with Virginia Surety's position that the same law firm representing Scalamandre in Kapler's lawsuit should represent plaintiffs Forest City and Bryant.

The plaintiffs have consistently rejected the offers of both insurance companies. They claim that there is an obvious conflict between them and Scalamandre by virtue of their suing Scalamandre as a third-party defendant. By limiting plaintiffs' claims against Scalamandre as condition of representing plaintiffs, the defendant insurance companies contend that the selection of the law firm is within their purview. So long as the plaintiffs refuse to accept the insurance company's selection of the law firm, they will not be provided with representation.

Virginia Surety's insistence that the plaintiffs use the same law firm as third-party defendant Scalamandre, and that they discontinue their third-party action is an indication that it is putting its interests ahead of the interests of its insureds. By doing so, they save the expense of a separate law firm for plaintiffs and they eliminate the liability of their insured Scalamandre, thereby absolving them of that expense. Where such a conflict exists,

it is well established, that, as between an insurer and its insured, a fiduciary relationship does exist, requiring good-faith by the carrier in its dealings with its insured. In defending a claim, an insurer is obligated to act with undivided loyalty. It may not place its own interest above those of its insured (citations omitted)

(Hartford Accident & Indemnity Co. v Michigan Mutual Insurance Co., 93 AD2d 337, 462 NYS2d 175 [1st Dept 1983]). The insured is entitled to choose separate counsel to be paid for by the insurer where such a conflict exists (*Feliberty v Damon*, 512 NY2d 112 [1988]; *Ladner v American Home Assurance Co.*, 201 AD2d 302, 607 NYS2d 296 [1st Dept 1994]).

Zurich argues that until Virginia Surety exhausts its \$1 million per occurrence on the plaintiffs and then the \$500,000 deductible on the policy, it does not have to make any payments. However, the Commercial Liability Endorsement of its policy states that:

this endorsement applies between you [Kajima] and us (Zurich). You [Kajima], will reimburse us (Zurich) for deductible amounts that we (Zurich) pay on your [Kajima] behalf.

The language of this policy prepared by the insurer places the burden on Kajima, not the plaintiffs, to pay the deductible. Accordingly, the plaintiffs are not responsible for paying the deductible. Moreover, the Virginia Surety policy does not need to be exhausted before Zurich's \$2 million dollar is pressed into service. Both policies recite they are primary and that they will not seek contribution from any other similar insurance unless the other insurance is provided by a contractor working on "the same operation and job location" ("Additional Insured Primary wording in the Virginia Policy; see, also, Zurich's Additional Insured Endorsement.)

When, there are, as here, there are two contractors with separate insurance companies, then paragraph 4C of Section IV - Commercial General Liability Conditions kicks in. This section requires a dollar for dollar sharing of legal expenses. When the \$1 million maximum of Virginia Surety is reached, the balance of Zurich's remaining \$1 million continues until it is exhausted.

Based on the foregoing, the motion and cross-motion are decided as follows; and it is

ADJUDGED and **DECLARED** that:

1. Defendants Zurich American Insurance Company and Virginia Surety Company are obligated to defend and indemnify the instant plaintiffs in the underlying lawsuit brought by Timothy Kapler in accordance with the terms of the applicable insurance policies;

- 2. Virginia surety Company is required to assign separate, and non-conflicted counsel to defend the instant plaintiffs in the underlying action;
- 3. Zurich American Surety Company and Virginia Surety company, Inc., are obligated to reimburse the instant plaintiffs for their costs and attorneys' fees incurred in the defense of the underlying action brought by Timothy Kapler; and it is further

ORDERED that the question of the amount of attorneys' fees and costs is severed and referred to the Referees' Clerk to assign to a Special Referee to Hear and Decide and enter a judgment thereon for the amount of legal fees and costs that is awarded to the instant plaintiffs for the underlying action brought by Timothy Kapler.

Dated: 11/7/10

Enter:

LY

UNFILED JUDGMENT

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

Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE