

National Fire Ins. Co. of Hartford v Harleysville Ins. Co.

2011 NY Slip Op 32336(U)

August 21, 2011

Supreme Court, New York County

Docket Number: 601631/09

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan, Justice

Part 36
UNFILED JUDGMENT

NATIONAL FIRE INSURANCE COMPANY OF
HARTFORD,

Plaintiff,

-against-

HARLEYSVILLE INSURANCE COMPANY,

Defendant.

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).

INDEX NO. 601631/09

MOTION SEQ. NO. 001

The following papers, numbered 1-5 were considered on this motion and cross motion for summary judgment:

| <u>PAPERS</u> | <u>NUMBERED</u> |
|---------------------------------------------------------------------|-----------------|
| Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____ | <u>1, 2</u> |
| Answering Affidavits — Exhibits _____ | <u>5</u> |
| Replying Affidavits _____ | <u>3, 4</u> |
| Cross-Motion: [X] Yes [] No | |

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided as indicated below.

This is a declaratory judgment action brought by plaintiff, seeking, among other things, an order declaring that defendant is obligated to defend and indemnify Americon Construction, Inc. (Americon), as an additional insured, in an underlying proceeding pending in the Supreme Court of Nassau County captioned *Curtis Damone v. Americon Construction Inc., Gomidas Holding Corp. and Tamara Properties, Inc.*, Index No. 005179/08 (Underlying Action). Plaintiff also asserts that it is entitled to reimbursement for costs and expenses paid in defense of Americon in the Underlying Action.

Plaintiff's declaratory judgment complaint alleges that plaintiff and defendant are co-insurers of Americon, the general contractor retained to perform services in a building owned by Gomidas Holding Corp. (Gomidas) and Tamara Properties, Inc. (Tamara). Americon hired Gallagher Electrical

Contractors, Inc. (Gallagher) as its subcontractor to conduct electrical work. Plaintiff's complaint further claims that on October 25, 2006, Curtis Damone (Damone), employed by Gallagher, was working on the construction site in the building when he was allegedly struck by a falling pipe and sustained serious personal injuries. Damone commenced the Underlying Action against Americon, Gomidas, and Tamara. Thereafter, Americon commenced a third-party action against Gallagher as subcontractor. Defendant herein is Gallagher's general liability insurer, whereas plaintiff herein is Americon's general liability insurer.

Defendant has filed the within motion for summary judgment pursuant to CPLR §3212 seeking a declaratory judgment that the insurance policy issued by plaintiff (National Fire Policy) provides primary coverage to Americon, while the insurance policy issued by defendant (Harleysville Policy) to Americon, as additional insured, provides coverage on an excess basis only. Plaintiff cross-moves seeking a declaratory judgment that: 1) the Harleysville Policy, issued by defendant, provides primary coverage to Americon for the Underlying Action; 2) the National Fire Policy, issued by plaintiff, merely provides excess coverage; 3) defendant is obligated to defend and indemnify Americon in the Underlying Action; and 4) defendant is required to reimburse plaintiff for costs and expenses incurred on behalf of Americon in the Underlying Action.

The proponent of a summary judgment motion, has the burden to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Here, both parties claim insurance coverage on an excess basis only alleging the other as primary. No issues of fact have been raised by either side as the facts are largely uncontested. Both parties agree that their respective insurance policies cover the subject loss at issue in the Underlying Action. The only issue to be determined here is priority of coverage. "As a general rule, the construction of terms and

conditions of an insurance policy that are clear and unambiguous presents a question of law to be determined by the court.” See *Commercial Union Ins. Co. v. Liberty Mut. Ins. Co.*, 36 AD3d 645, 645 (2007).

Defendant argues that in determining priority of coverage, the court can only look to the language of the policies. Defendant relies on the plain language of the “Other Insurance” clauses in the National Fire Policy and the Harleystown Policy to demonstrate that the Harleystown Policy provides coverage on an excess basis only. The Harleystown Policy, in the “Other Insurance” clause, provides that:

1. If there is other insurance covering the same loss or damage, we will pay only for the amount of covered loss or damage in excess of the amount due from that other insurance, whether you can collect on it or not. But we will not pay more than the applicable Limit of Insurance.
2. Business Liability Coverage is excess over any other insurance that insures for direct physical loss or damage.
3. When this insurance is excess, we will have no duty under Business Liability Coverage to defend any claim or ‘suit’ that any other insurer has a duty to defend. If no other insurer defends, we will undertake to do so; but we will be entitled to the insured’s rights against all those other insurers.”

Defendant contends that since the National Fire Policy, issued by plaintiff, is another insurance covering the same loss, this triggers the “Other Insurance” clause of the Harleystown Policy, thus making it excess over the National Fire Policy.

When interpreting unambiguous contract provisions “matters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument.” See *Chimart Assoc. v. Paul*, 66 NY2d 570, 572-573 (1986). Both the National Fire Policy and the Harleystown Policy’s “Other Insurance” clauses are unambiguous. “In considering the primacy of the insurance policies...in the context of construction projects, the terms of the individual policies take precedence over the terms of the various trade contracts for purposes of determining priority.” See *Tishman Constr. Corp. v. Great American Insurance Co.*, 53 AD3d 416, 419 (2008).

Thus, looking only to the insurance policies to determine priority of coverage “among different insurers covering the same risk, a court must consider the intended purpose of each policy ‘as evidence by both its stated coverage and the premium paid for it, as well as...the wording of its provision concerned excess insurance.’ ” See *Indemnity Insurance Co. of North America v. Paul Mercury Ins. Co.*, 74 AD3d 21, 26 (2010)(internal quotation and citations omitted). Gallagher obtained primary general liability insurance through defendant. Americon was added as additional insured on the Harleysville Policy. It is clear that the intended purpose of the Harleysville Policy was to provide primary general liability insurance to Gallagher and to Americon, as an additional insured. Defendant argues that despite the intended purpose of the policy, the plain language of the Harleysville Policy’s “Other Insurance” clause renders it excess to any “other insurance covering the same loss or damage...whether you can collect on it or not.” It is undisputed that the National Fire Policy covers the same loss or damage as the Harleysville Policy. Therefore, the “Other Insurance” clause in the Harleysville Policy renders it excess insurance, as Americon has other insurance covering the same subject loss at issue in the Underlying Action.

Plaintiff, however, argues that the Harleysville Policy provides primary coverage as per their subcontract with Gallagher and based on the National Fire Policy’s “Other Insurance” clause. The National Fire Policy has an “Other Insurance” clause which states in relevant part:

a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

b. Excess Insurance

This insurance is excess over:

- (1) ...

- (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.”

Plaintiff states that Americon required Gallagher to obtain general liability insurance coverage and to add Americon as an additional insured. The subcontract specifically required Gallagher’s insurer to provide insurance on a “primary, non-contributory basis”, thus making the Harleysville Policy primary insurance for Americon as additional insured.

As stated above, a court should not “give evidentiary weight to the insurance procurement provisions of the subcontract...since it is the policy provisions that control and not the provisions of the subcontract.” *See Travelers Indemnity Co. V. American and Foreign Ins. Co.*, 286 AD2d 626, 626 (2001). As such, the requirements of the subcontract between Americon and Gallagher are not relevant to the determination of priority of coverage.

Turning to the “Other Insurance” clause of the National Fire Policy, it is clear that the policy provides primary insurance coverage, unless there is other primary insurance covering the same occurrence or incident. The Harleysville Policy was intended to provide primary general liability insurance to Gallagher, with Americon as additional insured. “ ‘Additional insured’ is a recognized term in insurance contracts...the ‘well-understood meaning’ of the term is ‘an entity enjoying the same protection as the named insured.’ ” *See Pecker Iron Works of New York, Inc. V. Traveler’s Ins. Co.*, 99 NY2d 391, 393 (2003)(internal citations omitted); *see also Kassis et al. v. The Ohio Casualty Ins. Co.*, 12 NY3d 595, 599-600 (2009); *Wong v. New York Times Co.*, 297 AD2d 544, 547 (2002). As an additional insured on the Harleysville Policy, Americon was entitled to the same primary general liability insurance Gallagher received. As such, the Harleysville Policy is a primary insurance for Americon, which triggers the “Other Insurance” clause of the National Fire Policy, making the National Fire Policy excess over the Harleysville Policy.

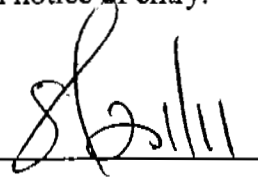
The language of the "Other Insurance" clauses in both policies provide that the policies are excess over the other. "In such a case the excess coverage clauses are deemed to cancel each other out and each carrier is required to contribute ratably in such proportion as its policy limit bears to the total of all policy limits." See *State Farm Fire and Casualty Co. v. Argeo LiMauro*, 65 NY2d 369, 374 (1985); see also *Federal Ins. Co. V. Atlantic Nat. Ins. Co.*, 25 NY2d 71, 75-76 (1969); *Sport Rock Intern. v. American Cas. Co. of Reading, PA*, 65 AD3d 12, 19 (2009). In view of the conflicting clauses in both policies, it is determined that the "Other Insurance" clauses cancel each other out and plaintiff and defendant must defend and indemnify Americon in equal shares, and share equally in the defense of Americon in the Underlying action.

As such, it is

ORDERED, ADJUDGED and DECLARED that defendant's motion for summary judgment is granted only to the extent that plaintiff and defendant shall have a duty to defend and indemnify Americon in equal shares, and share equally in the defense of Americon in the Underlying action; it is further

ORDERED that plaintiff's cross-motion for summary judgment is denied; and it is further

ORDERED that within 30 days of entry, defendant shall serve a copy of this decision/order upon plaintiff with notice of entry.

Dated: 


DORIS LING-COHAN, J.S.C.

Check one: FINAL DISPOSITION
Check if Appropriate: DO NOT POST

NON-FINAL DISPOSITION

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