SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA

JUSTICE

----------X PART 8

VITO SALADINO, ANNMARIE SALADINO, and MCANDREW, CONBOY & PRISCO, LLP.

INDEX NO.: 7427/11

Plaintiffs,

MOTION DATE: 07/21/11
SEQUENCE NO. 001, 003

-against-

STEWART & STEVENSON SERVICES, INC., STEWART & STEVENSON TECHNICAL SERVICES, INC., STEWART & STEVENSON TUG, AMERICAN AIRLINES, INC., LEXINGTON INSURANCE CO., WESTCHESTER FIRE INSURANCE CO., NATIONAL UNION FIRE INSURANCE CO., INSURANCE CO. OF THE STATE OF PENNSYLVANIA, and CHARTIS PROPERTY CASUALTY CO.,

Defendants,

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Upon the foregoing papers, plaintiffs' motion (Seq. 01) for declarations pertaining to the distribution of settlement funds from Lexington Insurance Co., plaintiff's right to proceed to collect the full amount of the judgment from the carrier defendants herein, and the liability of Westchester Fire Insurance Co., National Union Fire Insurance Co., Insurance Co. of the State of Pennsylvania, and Lexington Insurance Co. for the full amount of post-judgment interest, is granted only to the extent directed below. Defendant Lexington Insurance Co.'s motion for a declaration that it has no obligation to pay pre-judgment or post-judgment interest in the underlying action and that its duty to defend its insureds Stewart & Stevenson Services, Inc.,

Stewart & Stevenson Technical Services, and Stewart & Stevenson Tug, in the underlying action was terminated on or about February 11, 2011, is also granted to the extent directed below.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action for a declaratory judgment. On January 17, 1999, plaintiff Vito Saladino was employed by defendant American Airlines as a fleet service clerk at John F. Kennedy Airport. On said date, he was a passenger in a baggage tug manufactured by Stewart and Stevenson and driven by fellow employee, Daniel Snow. The vehicle came into the path of an American Airline aircraft which was allegedly conducting an unscheduled engine test at the gate. The jet wash from the aircraft engines picked up the hood of the tug, which was not equipped with hinge stops, and rotated into the passenger compartment, hitting plaintiff Vito Saladino in the head and rendering him a quadriplegic.

Thereafter, Vito Saladino and his wife, Annmarie Saladino, brought a personal injury action against Stewart & Stevenson in the United States District Court for the Eastern District of New York, under caption *Saladino v. Stewart & Stevenson et. al.*, Docket No. 01-CV-7644 (hereinafter referred to as the "underlying action"). Stewart & Stevenson impleaded American Airlines, the plaintiff's employer, as a third-party defendant in the underlying action pursuant to the "grave injury" provisions of the Workers' Compensation Law. The underlying action proceeded to trial and, on November 26, 2008, at the end of the liability phase of the action, the jury found in plaintiffs' favor and determined that Stewart & Stevenson was 30 percent liable for the injury and that American Airlines was 70 percent liable. Thereafter, on July 26, 2010, a separate jury awarded plaintiff Vito Saladino an aggregate amount of $39,440,477.20 in past and future damages and awarded plaintiff Annmarie Saladino $750,000 for loss of services. A judgment was entered in the Eastern District of New York on March 4, 2011. The plaintiff contends that the total amount of the judgment, including pre-judgment interest, is in excess of $48,000,000. Plaintiffs contend that the persons and entities having a right to recovery under the judgment are Vito Saladino, Annmarie Saladino, and McAndrew, Conboy & Prisco, LLP, to the extent of its legal fees and disbursements.

According to the plaintiffs, several insurance policies are implicated by the judgment. During the period in which the injury occurred, Stewart & Stevenson had a primary policy issued by defendant Lexington Insurance Co. (hereinafter "Lexington"), with policy limits of $1,000,000 per occurrence, subject to a $500,000 self-insured retention. Stewart & Stevenson also possessed the following layers of excess insurance: $20 million in excess of the primary policy from Westchester Fire Insurance Co. (hereinafter "Westchester"), impaired by $4,000,000

in payments on other claims; $15 million from National Union Fire Insurance Co. (hereinafter "National Union") in excess of the Westchester policy; $20 million from the Insurance Company of the State of Pennsylvania (hereinafter "Pennsylvania") in excess of the National Union policy; and $10 million from Lexington in excess of the Pennsylvania policy. Plaintiff further contends that American Airlines possessed insurance issued by Chartis Property Casualty Co. (hereinafter "Chartis") which covers, *inter alia*, any losses that it has or may in the future sustain with respect to the claims underlying this action. Plaintiff contends that this coverage is unlimited pursuant to Section 1(b) of the Workers' Compensation Law.

After the liability verdict, but before the judgment was entered, defendant Lexington, in its capacity as primary policy issuer, sent a letter, on or about November 10, 2010, through its counsel that Lexington intended to pay its full $1,000,000 policy limits to the plaintiffs "without any conditions, without regard to any appeal, and without any prejudice to any parties' rights or obligations." Counsel for plaintiff then sent a letter to counsel for all parties proposing that they stipulate that the plaintiffs' acceptance of the $1,000,000 primary insurance proceeds would not prejudice plaintiff's remaining rights to collect the full amount of the judgment. The parties would not agree to same.

On February 11, 2011, Lexington issued a check payable to the plaintiffs in the amount of $1,000,000 with a letter stating that same was being paid without any conditions or reservation of rights. As the other parties have failed to stipulate as to plaintiff's rights upon the acceptance of the tender, the plaintiffs have not cashed or deposited the check and same has not been disbursed to the Saladinos or their counsel.

As such, plaintiff moves for a declaratory judgment specifying:

a. That Lexington's obligation to pay post judgment interest terminated with its November 10, 2010 letter tendering its full $1,000,000 policy or in the alternative, with its letter of February 11, 2011 and issuance of a check for $1,000,000 payable to Vito Saladino, Annmarie Saladino, and McAndrew, Conboy & Prisco;

b. That the plaintiff may deposit the Lexington Insurance Company funds tendered without prejudice to its rights against any and all parties hereto to obtain full satisfaction of the Eastern District judgment;

c. That McAndrew, Conboy & Prisco, LLP, attorneys for the plaintiff, may distribute the aforesaid funds to plaintiffs Vito Saladino, Annmarie Saladino, and McAndrew, Conboy & Prisco, LLP, without prejudice to their rights as and against any and all parties hereto to obtain full satisfaction of the judgment in the underlying action;

d. That acceptance and disbursement of the funds tendered by Lexington does not constitute a settlement of plaintiffs' claims and/or an accord and satisfaction as against any party and/or insurance carrier in the underlying action;

e. That acceptance and deposit of the aforesaid funds does not impair, impede, forfeit and/or waive plaintiff's right to proceed against Westchester, National Union, Pennsylvania, Lexington, in its capacity as excess carrier, and/or Stewart & Stevenson to the extent of its self insured retention and/or any gap in coverage, and to collect the full amount of the judgment in the underlying action, subject to the stay currently in effect;

f. That Westchester, National Union, Pennsylvania, and Lexington, in its capacity as excess carrier, are liable for the full amount of post-judgment interest in the underlying action in light of Lexington's unconditional tender of its primary policy; and

g. That plaintiffs are entitled to costs and disbursements for the instant action.

In addition, defendant Lexington moves for an order declaring: (a) that Lexington has no obligation to pay for pre-judgment interest or post-judgment interest in the underlying action, and (b) that Lexington's duty to defend its insureds, Stewart & Stevenson Services, Inc., Stewart & Stevenson Technical Services, and Stewart & Stevenson Tug, in the underlying action, terminated on February 11, 2011 when Lexington unconditionally tendered its full $1,000,000 primary policy limits to the plaintiffs Vito Saladino and Annmarie Saladino.

Under the "Defense and Related Payments" section of the Lexington primary policy, Lexington agreed to pay, in addition to its policy limits, "all interest on the entire amount of any judgment therein which accrues after entry of the judgment and before the Company has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the Company's liability thereon." Accordingly, Lexington only has an obligation to pay post-judgment interest accruing before Lexington "paid or tendered"its policy limits. In addition, pursuant to 11 NYCRR §60-1.1(b), the primary carrier must pay "all costs taxed against the insured in any [lawsuit], and all interest accruing after entry of judgment as does not exceed the applicable policy limits." An unconditional payment into escrow satisfies the rule and cuts off the primary carrier's responsibility for further interest payments. *(Levit v. Allstate Ins. Co.*, 308 A.D.2d 475, 764 N.Y.S.2d 452 (2d Dept. 2003)). The payment of Lexington's $1,000,000 policy limits satisfied the requirements of the policy and "stopped the clock" on the accrual of post-judgment interest on the full amount of the judgment. *(Id.; see also, Miraglia v. Essex Ins. Co.*, 20 Misc.3d 1122(A), 867 N.Y.S.2d 376 (Orange Cty. Sup. Ct. 2008)(holding that the insurer's

unconditional tender of its policy limits terminated its obligation to pay post-judgment interest); *See also, Wireman v. Reith*, 220 A.D.2d 582, 633 N.Y.S.2d 42 (2d Dept. 1995). As Lexington tendered its full policy prior to the entry of the judgment, Lexington has no liability for post-judgment interest. Further, Lexington is not obligated to pay pre-judgment interest herein, as absent a contractual provision to the contrary, a liability insurance carrier is not liable for prejudgment interest in excess of the limits of the policy. (*Ashkenazy v. National Union Fire Ins. Co.*, 245 A.D.2d 326, 665 N.Y.S.2d 99 (2d Dept. 1997)).

Further, acceptance and disbursement of Lexington's tender does not operate as a settlement or an accord and satisfaction, and would not prejudice, impair or waive plaintiffs' right to collect the remainder of the judgment from the excess carriers after the stay is lifted. The acceptance of funds from a primary carrier does not, as a matter of law, preclude recovery against the excess carrier. (*See, Deblon v. Beaton*, 247 A.2d 172 (N.J. 1968); *see also, Loy v. Bunderson*, 320 N.W.2d 175 (Wis. 1982)(the public interest requires that a plaintiff be permitted to settle claims against some of the exposed parties without releasing others); *Drake v. Ryan*, 514 N.W.2d 785 (Minn. 1994)). "A primary insurer is permitted, and should be encouraged, to settle a claim in discharge of its duties without being impeded or prejudicing the excess insurer, which is left in the same position after a settlement by the primary insurer as before." (*Siligato v. Welch*, 607 F.Supp 743, 745 (D.Conn 1985); *See also, Royal Ins. Co. of America v. Reliance Ins. Co.*, 140 F.Supp.2d 609 (D.S.C. 2001)). Moreover, the tender of the policy is not an accord and satisfaction, because it is not an executed contract. (*See, Sorrye v. Kennedy*, 267 A.D.2d 587, 699 N.Y.S.2d 214 (3d Dept. 1999); *Pincus-Litman Co., Inc. v. Canon USA, Inc.*, 98 A.D.2d 681,469 N.Y.S.2d 756 (1st Dept. 1983)). The Court notes that none of the parties hereto have submitted opposition to, or raised any objection to, plaintiff's contention that an acceptance of Lexington's tender by the plaintiffs would not constitute a settlement of the underlying action and that the deposit of the tendered funds would not impede, waive, forfeit, or prejudice plaintiffs' right to proceed against the remaining defendants and excess insurance carriers.

In addition to the above, Lexington contends that its primary policy states that Lexington "shall not be obligated to defend any suit after the applicable limit...has been exhausted by the payment of judgments or settlements and the discharge of its defense and payment obligations as provided in paragraph VI." The policy language "makes clear that the insurer has no obligation to defend after the liability limits have been exhausted." (*Matter of East 51st Street Crane Collapse Litigation*, 84 A.D.3d 512, 923 N.Y.S.2d 64 (1st Dept. 2001); *see also, Champagne v. State Farm Mut. Auto. Ins. Co.*, 185 A.D.2d 835, 586 N.Y.S.2d 813 (2d Dept. 1992)).

Defendant Westchester opposes both motions, arguing, *inter alia*, that a question of fact

exists as to which state's law applies; that discovery is needed before there can be a declaration that Lexington's tender cut off its post-judgment interest and defense obligations; and that Westchester is not liable for the full amount of post-judgment interest in the underlying action. Westchester contends that a finding must be made as to which state's law applies to the interpretation of the Lexington and Westchester policies before a declaratory judgment can be rendered.

Westchester argues that Stewart & Stevenson has its principal place of business in Houston Texas and the Lexington and Westchester polices were "presumably" issued to it there. The producer on the Lexington policy is John L Wortham & Son, LLP, from Texas, so Westchester argues that the place of contracting was likely in Texas. Westchester also contends that the Lexington policy had a Texas specific endorsement and provides that the underwriting branch for the specific policy is in Houston. As such, Westchester argues that questions of fact exist regarding whether New York or Texas law should apply to the interpretation of the policies issued to Stewart & Stevenson.

Westchester has not, however, demonstrated the existence of an actual conflict of laws herein. Where the result is the same under both states' laws, "any choice of law issue is moot." (*Matter of Bottjer*, 11 Misc.3d 1065(A), 816 N.Y.S.2d 693 (Nassau Cty. Surr. Ct 2006); *Beatie v. Long*, 164 A.D.2d 104 (1st Dept. 1990)(defendants failed to demonstrate that New Jersey law was more favorable than New York law). Courts will dispense with choice-of-law analysis if there is no conflict between the laws of the competing jurisdictions. (*International Business Machines Corp. v. Liberty Mutual Ins. Co.*, 363 F.3d 137 (2d Cir. 2004)(choice of law does not matter unless the laws of the competing jurisdictions are actually in conflict); *See also, J. Aron & Co. v. Chown*, 231 A.D.2d 426, 647 N.Y.S.2d 208 (1st Dept. 1996); *Matter of Allstate Ins. Co. (Stolarz)*, 81 N.Y.2d 219, 613 N.E.2d 936 (1993)). Texas law and New York law agree that an unconditional payment of policy limits terminates any further duty to pay post-judgment interest. (*See, Baucom v. Great American Ins. Co. of N.Y.*, 370 S.W.2d 863 (Tex. 1963); *Texas Employers Ins. Ass'n v. Underwriting Members of Lloyds*, 836 F.Supp. 398 (S.D. Tex 1993); *Levit v. Allstate Ins. Co.*, 308 A.D.2d 475, 764 N.Y.S.2d 452 (2d Dept. 2003)). Accordingly, Lexington has no obligation to post-judgment interest in the underlying action.

In addition, under either Texas law or New York law, once a primary insurer has exhausted its policy limits by payment toward a judgment, its duty to defend terminates. (*Mid-Century Ins. Co. of Texas v. Childs*, 15 S.W.3d 187 (Tex. App. 2000)("the policy language clearly reflects the parties' intent to limit the duty to defend to the time before the policy limits are exhausted"); *American States Ins. Co. of Texas v. Arnold*, 930 S.W.2d 196 (Tex. App.

1996)(the only reasonable interpretation of the policy language is that the insurer will defend or settle any claim, but the defense obligation will terminate if and when the insurer's policy limits are exhausted); *Matter of East 51st Street Crane Collapse Litigation*, 84 A.D.3d 512, 923 N.Y.S.2d 64 (1st Dept. 2001); *Champagne v. State Farm Mut. Auto. Ins. Co.*, 185 A.D.2d 835, 586 N.Y.S.2d 813 (2d Dept. 1992)). As such, in accordance with the terms of the Lexington primary policy, after Lexington tendered its primary policy on February 11, 2011, it was no longer obligated to defend Stewart & Stevenson.

Westchester further argues in opposition that the within applications should be denied because discovery is required to determine how Lexington handled the defense of the underlying action and why said action failed to settle. Westchester, however, failed to assert any cross-claim against Lexington in the instant action. If Westchester chooses to assert a bad faith claim against Lexington, it must commence a plenary action against Lexington. Moreover, the exhaustion of Lexington's policy limits and its obligations with respect to the payment of post-judgment interest are separate issues from its duty of good faith and do not affect its obligations to the plaintiffs or to its insureds.

Lastly, while plaintiff seeks a declaration that Westchester and Stewart & Stevenson's other excess carriers are liable for the full amount of post judgment interest, the Westchester policy provides that it "will pay all post-judgment interest against the 'Insured' attributable to that part of any judgment which we become obligated to pay; but our duty to pay such interest ends when we have paid or offered to pay or deposited in court, the part of the judgment which we become obligated to pay and which is within the applicable 'Limits of Insurance.'" As such, Westchester contends that its policy provides that it is only obligated for post-judgment interest on that portion of the judgment that Westchester is ultimately obligated to pay, which it contends is only thirty percent of the judgment herein based upon the jury's liability finding that Stewart & Stevenson was only 30 percent fault. Plaintiff counters that since Stewart & Stevenson was the main defendant in the underlying action, and American Airlines was the third party defendant, Stewart & Stevenson and its excess insurance carriers, are responsible to pay the entire judgment, regardless of the liability apportionment, and can then thereafter recoup 70 percent from American Airlines and its insurers.

While the Court notes that defendant Stewart & Stevenson is responsible to pay the entire judgment to the plaintiffs, as Article 16 does not apply to a claim against a defendant where the claimant has sustained a "grave injury" under section 11 of the Workers' Compensation Law (See, CPLR §1602(4)), the Court is unable determine upon the submissions before it, what responsibility Westchester or Stewart & Stevenson's other insurers have with respect to any post-

judgment interest payments each must make in the underlying action under the terms of their respective policies.

Accordingly, the Court hereby declares the following:

a. That Lexington's obligation to pay post judgment interest terminated with its its letter of February 11, 2011 and issuance of a check for $1,000,000 payable to Vito Saladino, Annmarie Saladino, and McAndrew, Conboy & Prisco; and Lexington has no obligation to pay pre-judgment interest s its full primary policy has been tendered;

b. That the plaintiff may deposit the Lexington Insurance Company funds tendered without prejudice to its rights against any and all parties hereto to obtain full satisfaction of the Eastern District judgment;

c. That McAndrew, Conboy & Prisco, LLP, attorneys for the plaintiff, may distribute the aforesaid funds to plaintiffs Vito Saladino, Annmarie Saladino, and McAndrew, Conboy & Prisco, LLP, without prejudice to their rights as and against any and all parties hereto to obtain full satisfaction of the judgment in the underlying action;

d. That acceptance and disbursement of the funds tendered by Lexington for its primary policy does not constitute a settlement of plaintiffs' claims and/or an accord and satisfaction as against any party and/or insurance carrier in the underlying action;

e. That acceptance and deposit of the aforesaid funds does not impair, impede, forfeit and/or waive plaintiff's right to proceed against Westchester, National Union, Pennsylvania, or Lexington, in its capacity as excess carrier, and/or Stewart & Stevenson to the extent of its self insured retention and/or any gap in coverage, and to collect the full amount of the judgment in the underlying action, subject to the stay currently in effect;

f. That Lexington's duty to defend its insureds, Stewart & Stevenson Services, Inc., Stewart & Stevenson Technical Services, and Stewart & Stevenson Tug, in the underlying action terminated on February 11, 2011 when Lexington unconditionally tendered its full $1,000,000 primary policy limits to the plaintiffs Vito Saladino and Annmarie Saladino in the underlying action.

Plaintiffs' request for costs is denied.

Nothing in this order shall be deemed to supercede or vacate the stay that is currently in effect in the Eastern District.

This constitutes the decision and order of this Court.

Dated: September 16, 2011

Anthony L. Parga, J.S.C.

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