SHORT FORM ORDER

INDEX No. 12-16942

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 001 - MG; CASEDISP

ST. PAUL FIRE & MARINE INSURANCE,

Plaintiff,

- against -

REPWEST INSURANCE COMPANY f/k/a REPUBLIC WESTERN INSURANCE COMPANY, AMERCO and U-HAUL CO. OF NEW YORK,

Defendants.

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Upon the following papers numbered 1 to 22 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 10 - 19; Replying Affidavits and supporting papers 22; Other memoranda of law 9, 20 - 21; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendants for an order pursuant to CPLR 3211 (a) (1) and (a) (7) dismissing the complaint is granted.

The plaintiff St. Paul Fire & Marine Insurance (St. Paul) brings this declaratory judgment action seeking a declaration that the defendants are co-insurers on the loss suffered in an underlying action entitled *Rosado v Hudson*, Supreme Court, New York County, Index No. 03-112854. The underlying action involves a motor vehicle accident that occurred on August 14, 2002. The accident allegedly happened when a bus with a trailer in tow struck and killed a pedestrian and injured her husband. The bus was owned, leased and operated by St. Paul's insureds. The trailer was owned by the defendant U-Haul of Georgia sued herein as U-Haul Co. of New York (U-Haul), an insured of the defendant Repwest Insurance Company formerly known as Republic Western Insurance Company (Repwest). The defendant Amerco (Amerco) is a named insured under the Repwest policy. In 2008, the underlying action was settled and St. Paul paid the full amount of the settlement without exhausting its policy limits. St. Paul then commenced this action seeking a declaration that Repwest, and to the extent a recovery is

not covered by Repwest's policy limitations, U-Haul and Amerco are co-insurers obligated to pay their one-half share of the amount paid in settlement of the underlying action.

In its complaint, St. Paul alleges that U-Haul, as owner of the trailer, is jointly and severally liable for the injuries to the plaintiffs in the underlying action pursuant to VTL 388, and that Repwest is thus a co-insurer for claims arising from those injuries. The defendants now move for an order dismissing the complaint for failure to state a cause of action and based on documentary evidence. Pursuant to CPLR §3211 (a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (Leon v Martinez, 84 NY2d 83). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (Guggenheimer v Ginzburg, 43 NY2d 268). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (Pacific Carlton Development Corp. v 752 Pacific, LLC, 62 AD3d 677; Gjonlekaj v Sot, 308 AD2d 471). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (Leon v Martinez, *supra*; International Oil Field Supply Services Corp. v Fadeyi, 35 AD3d 372; Thomas McGee v City of Rensselaer, 174 Misc2d 491). Upon a motion to dismiss, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (Chan Ming v Chui Pak Hoi et al, 163 AD2d 268).

Here, a review of the complaint reveals that the plaintiff has failed to assert a cognizable cause of action regarding the defendants' liability under the statute. It is well settled that, standing alone, VTL 388 does not make the insurer of a trailer a co-insurer with the insurer of a vehicle towing that trailer for personal injury claims arising out of an accident (Aetna Cas. and Sur. Co. v. Merchants Mut. Ins. Co., 100 AD2d 318 *affd* 64 NY2d 840; *see also* Fidelity & Cas. Co. of N.Y. v Cosmopolitan Mut. Ins. Co., 33 NY2d 966; Employers Mut. Liab. Ins. Co. of Wis. v Indemnity Ins. Co. of North Am., 37 Misc.2d 421). However, that does not end that inquiry as the courts are then required to examine the respective insurance policies to determine whether a right of contribution arises from the policies themselves (Aetna Cas. and Sur. Co. v Merchants Mut. Ins. Co., *supra*; *see eg.* General Mut. Ins. Co. v Sun Ins. Co. of N.Y., 24 AD2d 135 (insurer of tractor entitled to contribution from insurer of trailer where driver of tractor-trailer unit involved in collision was an additional insured under trailer owner's policy). The complaint fails to set forth allegations which would require such an inquiry. Accordingly, that branch of the defendants' motion which seeks to dismiss the complaint for failure to state a cause of action is granted.

In any event, the Court finds that a review of the respective policies shows that the defendants are entitled to the relief sought herein. Pursuant to CPLR 3211 (a) (1), a cause of action will be dismissed when documentary evidence submitted in support of the motion conclusively resolves all factual issues and establishes a defense as a matter of law (Leon v Martinez, *supra*; Vitarelle v Vitarelle, 65 AD3d 1034; Mazur Bros. Realty, LLC v State of New York, 59 AD3d 401). In support of their motion, the defendants submit the complaint, the respective insurance policies, and excerpts from the deposition taken in the underlying action of the operator of the bus. The defendants contend that a review of the respective policies shows that the St. Paul policy is the primary coverage in this instance, and that the Repwest policy is only excess coverage. The defendants further contend that, because the settlement in

the underlying action did not exhaust the policy limitations in the St. Paul policy, the defendants are not required to contribute to that settlement.

Generally, in determining priority of coverage issues, the courts first attempt to discern the purpose of the policies covering the risk, to see if they are either primary or excess (*see* Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co., 53 AD3d 140; Tishman Constr. Corp. of N.Y. v Great Am. Ins. Co.. 53 AD3d 416; Travelers Indem. Co. v American & Foreign Ins. Co., 286 AD2d 626). The test to be applied in determining the respective liabilities of concurrent insurers is whether the policies insure the same property, the same interest, and against the same risk (Medical Malpractice Ins. Assoc. v Medical Liab. Mut. Ins. Co., 86 AD2d 476 *appeal denied* 57 NY 2d 604; *see also* HRH Constr. Corp. v Commercial Underwriters Ins. Co., 11 AD3d 321; B.K. Gen. Contrs., Inc. v Michigan Mut. Ins. Co., 204 AD2d 584; Continental Ins. Co. v Commercial Union Ins. Co., 27 AD2d 333).

Thus, it is incumbent upon the Court to review the respective policies at issue herein. A review of the St. Paul policy reveals that the operator of the bus is a covered person thereunder. The Auto Liability Protection portion of the St. Paul Policy Form 44449 (Rev. 12-93) provides under the heading "What this Agreement Covers - Bodily injury and property damage liability" that St. Paul will:

> pay amounts any protected person is legally required to pay as damages for covered bodily injury or property damage that:
> •results from the ownership, maintenance, use, loading or unloading of a covered auto; and
> •is caused by an accident that happens while this agreement is in effect.
>
> * * *
>
> **Protected person** means any person or organization who qualifies as a protected person under the Who is Protected Under This Agreement section.

Form 44449 (Rev. 12-93) further provides under the heading "Who is Protected Under This Agreement" that:

> **Any permitted user**. Any person or organization to whom you've given permission to use a covered auto you own, rent, lease, hire or borrow is a protected person.

Under the heading "Which Autos Are Covered," the policy provides that:

> **Any Auto** means any owned, rented, leased or borrowed auto. It includes hired, nonowned, newly acquired, replacement and temporary substitute autos.
>
> * * *

> **Scheduled autos** means any auto you own that's described in the Auto Schedule. It includes any nonowned trailer while attached to a scheduled auto.

Here, the subject bus is listed on the Auto Schedule, and thus is a covered auto. In addition, under the heading "Other Insurance" Form 4449 (Rev. 12-93) provides:

> This agreement is primary insurance for covered autos you own and excess insurance for those you don't own.
>
> However, when a covered trailer is connected to a covered auto, this agreement applies to the trailer in the same way as the covered auto... If a trailer you don't own is connected to a covered auto you own, this agreement is primary insurance for the trailer.

It appears that U-Haul is an insured under two policies issued by Repwest. The first policy is a minimum financial responsibility (MFR) policy intended to enable U-Haul to meet the various automobile insurance requirements of all 50 states. The MFR policy number RA02, effective April 1, 2002 to April 1, 2003 provides:

> 3. COVERAGE
>
> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".
>
> * * *
>
> WHO IS AN INSURED
>
> The following are "insureds":
>
> 1) The Named Insured - Amerco, A Nevada Corporation, U-Haul International, Inc., a Nevada Corporation and their subsidiaries, affiliated, associated or allied companies, corporations, firms or individuals as now or hereafter constituted for which, the Named Insured has responsibility for placing insurance and for which similar coverage is not otherwise more specifically provided, and the U-Haul Federal Credit Union.
>
> 2) Lessees; their permissive users of owned autos; but only pursuant to all terms and conditions of the U-Haul Rental Contract during the time period specified by the U-Haul Rental Contract.

* * *

4. GENERAL CONDITIONS

* * *

5) OTHER INSURANCE

1 The coverage provided by this policy shall be primary insurance only with respect to the Named Insured and its agents or employees.

2 The coverage provided by this policy shall be excess insurance with respect to all other insured's over any other collectible insurance.

The second policy herein is a commercial liability policy (GL) number GL02 effective April 1, 2002 to April 1, 2003 which provides:

SECTION 1 - COVERAGES

COVERAGE A. Bodily Injury and Property Damage Liability

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments ...

SECTION II - WHO IS AN INSURED

* * *

Any lessee, renter or their permissive users are not included as a Named Insured or as an Insured under the terms of this policy.

SECTION IV - COMMERCIAL LIABILITY CONDITIONS

* * *

4. Other Insurance

> If other valid and collectible insurance is available to the Insured for a loss we cover under Coverages A,[1] B, C or D of this Coverage Part, our obligations are limited as follows:
>
> a. The coverage provided by this policy shall be primary insurance only with respect to the Named Insured and its agents or employees.
>
> b. The coverage provided by this policy shall be excess insurance with respect to all other insureds over any other collectible insurance ...

The GL policy, Form RGNI 04 98, entitled "Named Insured Endorsement" identifies the following as Named Insureds:

> Amerco, A Nevada Corporation, U-Haul International, Inc. a Nevada Corporation and their subsidiaries, affiliated, associated or allied companies, corporations, firms or individuals as now or hereafter constituted for which, the Named Insured has responsibility for placing insurance and for which similar coverage is not otherwise more specifically provided, and the U-Haul Federal Credit Union.

It is well settled that a court addressing an insurance coverage dispute must initially look to the language of the subject policy (Raymond Corp. v National Union Fire Ins. Co., 5 NY3d 157; State of New York v Home Indem. Co., 66 NY2d 669). The policy is construed "in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect" (Raymond Corp. v National Union Fire Ins. Co., *supra* at 162, quoting Consolidated Edison Co. of N.Y. v Allstate Ins. Co., 98 NY2d 208). "Unambiguous provisions of a policy are given their plain and ordinary meaning" (Lavanant v General Acc. Ins. Co., 79 NY2d 623) and ambiguous provisions are construed "against the insurer who drafted the contract" (State Farm Mut. Auto Ins. Co. v Glinbizzi, 9 AD3d 756).

Here, a reading of the subject policies reveals that the bus is a covered auto, and that the owner, lessee and operator of the bus are insureds under the plain terms of the St. Paul policy. A reading of the Repwest policies reveals that the owner and the lessee of the bus are not insureds of Repwest, that the bus is not a covered auto, and that the operator of the bus is, at most, a permissive user under the MFR policy. Before the insurer of one policy may enforce a right of contribution against another insurer on the ground of concurring coverage, the insurance provided by each must cover the same interest and against the same risk. Medical Malpractice Ins. Assoc. v. Medical Liab. Mut. Ins. Co., *supra*). Where

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[1] A review of the policy reveals that Coverage A provides coverage for bodily injury and property damage claims.

two insurers provide coverage to the same insured, but for separate and distinct risks, there can be no contribution between them (HRH Constr. Corp. v. Commercial Underwriters Ins. Co., *supra*). The Court finds that the policies of the respective insurers do not cover the same property, interest and risk, and that the defendants are not co-insurers regarding the subject motor vehicle accident. In addition, the Court finds that the St. Paul policy is primary insurance for both the bus and the U-Haul trailer that was attached to the bus. The plain language of the St. Paul policy states that a scheduled auto "means any auto you own that's described in the Auto Schedule. It includes any nonowned trailer while attached to a scheduled auto." It is undisputed that the bus is a scheduled auto and that St. Paul's insureds did not own the U-Haul trailer. Thus, the plain terms of the subject policies show a clear intent that the St. Paul policy is to be primary (*see* State Farm Fire & Cas. Co. v LiMauro, 65 NY2d 369; Andoh v Milano, 11 AD3d 241; Hartford Acc. & Indem. Co. v Ryder Truck Rental, 85 AD2d 145). Said finding is consistent with the requirement that insurance contracts be interpreted "according to the reasonable expectation and purpose of the ordinary businessman when making an ordinary business contract" (Atlantic Cement Co., Inc. v Fidelity & Cas. Co. of N.Y., 91 AD2d 412 *affd* 63 NY2d 798).

In opposition to the defendants' motion, the plaintiff contends that both policies contain similar other insurance provisions making the defendants co-insurers herein. As a general rule, "unless it would distort the plain meaning of the policies, where 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" (State Farm Fire & Cas. Co. v LiMauro, *supra*; Lumbermens Mut. Cas. Co. v Allstate Ins. Co., 51 NY2d 651; American Tr. Ins. Co. v Continental Cas. Ins. Co., 215 AD2d 342). In contrast, however, if one party's policy is primary with respect to the other policy, then the party issuing the primary policy must pay up to the limits of its policy before the excess coverage becomes effective (Great N. Ins. Co. v Mount Vernon Fire Ins. Co., 92 NY2d 682). Here, the Court finds that the St. Paul policy is primary insurance regarding the subject motor vehicle accident. Where the insurer of a trailer provides excess insurance, it does not have any obligation to contribute to the settlement of an action with the insurer of the towing vehicle (*see* Slabic v Hendrickson, 147 Misc 2d 472).

It is undisputed that St. Paul did not exhaust the limits of its policy in settling the underlying action. The Court finds that the policies submitted by the defendants conclusively resolve all factual issues, and establish their defense as a matter of law (*see* GuideOne Specialty Ins. Co. v Admiral Ins. Co., 57 AD3d 611; Topel v Reliastar Life Ins. Co. of New York, 6 AD3d 608; Randazzo v Gerber Life Ins. Co., 3 AD3d 485). Accordingly, that branch of the defendants' motion which seeks to dismiss the complaint pursuant to CPLR 3211 (a) (1) is granted.

Dated: April 22, 2013

HON. JOSEPH C. PASTORESSA, J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**