

National Interstate Ins. Co. v Zurich Am. Ins. Co.

2013 NY Slip Op 33479(U)

April 22, 2013

Supreme Court, New York County

Docket Number: 603218/09

Judge: Manuel J. Mendez

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

PRESENT: HON. MANUEL J. MENDEZ

PART 13

Justice

NATIONAL INTERSTATE INSURANCE COMPANY and
NEW YORK CRANE & EQUIPMENT CORP.,

INDEX NO. 603218/09
MOTION DATE 4-04-2013
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

Plaintiff(s),

- v -

ZURICH AMERICAN INSURANCE COMPANY, SORBARA
CONSTRUCTION CORP. and LEXINGTON INSURANCE COMPANY,

Defendant(s).

The following papers, numbered 1 to 5 were read on this motion and cross-motion to/ for Declaratory Judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 2</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>3 - 4</u>
Replying Affidavits _____	<u>5</u>

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Plaintiff's, National Interstate Insurance Company ("National"), Motion pursuant to CPLR Section 3212 seeking certain declarations is denied. Defendant's, Zurich American Insurance Company ("Zurich"), Cross-Motion pursuant to CPLR Section 3212 seeking certain declarations is granted in part as detailed herein.

This case relates to the collapse of a Kodiak Tower Crane (the "Crane") on May 30, 2008, at East 91st Street, New York County.

Plaintiff, New York Crane & Equipment Corp ("NY Crane"), was the owner and lessor of the Crane. Defendant, Sorbara Construction Corp. ("Sorbara"), leased the Crane from NY Crane.

National is NY Crane's general liability insurance carrier. Defendant Lexington Insurance Company ("Lexington") is NY Crane's excess insurance

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

carrier.

Zurich is Sorbara's general liability and excess insurance carrier. An endorsement, "Additional Insured - Automatic - Owners, Lessees or Contractors," amended the general liability policy to "include as an insured any person or organization who [Sorbara is] required to add as an additional insured on this policy under a written contract or written agreement." The Crane rental agreement between NY Crane and Sorbara required Sorbara to make NY Crane an additional insured on the insurance policies procured by Sorbara.

On November 11, 2011, the Honorable Paul G. Feinman, who previously presided over these proceedings, issued a declaration that,

pursuant to the rental agreement between Sorbara and NY Crane, and the terms of its 'other insurance' clause, the Zurich commercial general policy is primary to all other insurance policies at issue. Upon exhaustion of the Zurich commercial general policy, the National policy's duty to defend is triggered. The [Feinman C]ourt rejects National's contention that the National policy is excess to the Zurich umbrella policy based on the terms of the [C]rane rental agreement between NY Crane and Sorbara...Both the Zurich and Lexington umbrella policies only come into play after all primary insurance is exhausted...the umbrella insurers must apportion the costs of defending and indemnifying the insured on a pro-rata basis. Thus, upon exhaustion of the Zurich primary policy and then the National primary policy, Zurich and Lexington must contribute in the proportion their policies bear to the limit of coverage at that level.

On January 11, 2012, Justice Feinman ordered National to provide Zurich with documentation substantiating the expenses National had incurred in defending NY Crane. Zurich was ordered to review the documentation and notify National regarding objections to the reasonableness of such expenses.

National provided Zurich with the documentation and Zurich objected to certain expenses according to four categories: entries that were redacted and could not be analyzed, expenses related to the criminal charges brought against the owners of NY Crane and/or other governmental body investigations/proceedings, legal services related to the declaratory judgement action between National and Zurich, and entries that lacked sufficient information to be analyzed.

National and Zurich settled the first and third categories of objections. National provided un-redacted information to Zurich, and National agreed that expenses related to the declaratory judgment proceedings were not reimbursable.

Zurich and National have not been able to reach an agreement regarding the second and fourth categories of objected expenses and the parties also question whether administrative fees expended by National in hiring a company to audit NY Crane's legal bills prior to National paying such bills are also reimbursable.

National brings this Motion seeking a declaration as to what reimbursement Zurich owes to National. Zurich brings a Cross-Motion seeking declarations as to the same.

National argues that Zurich has never identified the exclusion or policy provision it relies upon to disclaim coverage as to those claims.

"The duty to defend arises whenever the allegations in a complaint against the insured fall within the scope of the risks undertaken by the insurer, regardless of how false or groundless those allegations might be." *Seaboard Sur. Co. v. Gillette Co.*, 64 N.Y.2d 304, 310, 476 N.E.2d 272 (1984).

National's argument mis-states the question before this Court. "Generally, it is for the insured to establish coverage and for the insurer to prove that an exclusion in the policy applies to defeat coverage." *Consol. Edison Co. of New York, Inc. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 218, 774 N.E.2d 687 (2002).

National fails to establish that the expenses related to the criminal defense and/or governmental investigations are covered by Zurich's insurance policy. Zurich's policy obligates Zurich to, "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. [Zurich] will have the right and duty to defend the insured against any 'suit' seeking those damages."

National argues that if "any of the claims against an insured arguably arise from covered events, the insured is required to defend the entire action." *Fieldston Prop. Owners Ass'n, Inc. v. Hermitage Ins. Co., Inc.*, 16 N.Y.3d 257, 264, 945 N.E.2d 1013 (2011).

National argues for the applicability of this case law in the present case by comparing the present situation to cases of insurers defending claims against corporate executives as fiduciaries or agents of the corporation being required to also cover claims against those same corporate executives as individuals.

National has not shown how expenses related to the defense of criminal charges and governmental investigations fall within the insurance coverage for legally obligated damages resulting from bodily injury or property damage.

Furthermore, this Court does not agree with National's analogy to corporate officer insurance cases and the intertwining of civil and criminal coverage. The 'entire action' which Zurich should be obligated to defend would encompass all claims against NY Crane within the civil proceedings regardless of assertions of negligence on the part of NY Crane. The cases cited by National would support an assertion that Zurich would have to defend the entire civil action and then attempt to recoup expenses based on findings of negligence against NY Crane, not an assertion that general liability insurance issued to a construction company for personal injury and property damages covers criminal acts.

Therefore, Zurich is not obligated to reimburse National for any expenses for the defense of criminal charges and/or governmental investigations.

National similarly confuses the question before the Court in regards to Zurich's other category of objections, entries with too little information to be analyzed.

National is correct in asserting that Courts deem expenses paid by an insured as reasonable by virtue of the fact that the insured paid them without knowing whether they would be reimbursed. However, as this Court understands Zurich's objection, Zurich is not challenging the reasonableness of the expenses with too little information, Zurich is challenging whether such entries are related to the civil defense of NY Crane or related to the uncovered criminal defense.

In both of the challenged categories, National bears the burden of proving that such expenses are covered as civil defense expenses before the burden shifts to Zurich to prove an exception. For any expense that National cannot establish coverage, Zurich is not obligated to reimburse.

This Court is not able to rule on each of the objected to expenses under the categories of criminal defense expenses and insufficient information to determine whether they are criminal defense expenses. As requested by both parties, such individual determinations will have to be done by a referee.

National argues that expenses relating to the professional legal audit of NY Crane's legal bills paid by National are reimbursable. National again argues that Zurich has failed to cite a policy provision to justify rejecting the expenses. National further argues that the audit services benefit Zurich. Again, National fails to establish how such expenses would be covered under Zurich's policy. Such fees were not expended to defend NY Crane. National is not able to cite any case law from this jurisdiction to support its assertions. As such, the legal audit fees are not reimbursable.

National requests interest on the reimbursement Zurich owes. National correctly asserts that CPLR Section 5001(a) grants interest upon sums awarded because of a breach of performance of a contract. National cites case law which it argues stands for the proposition that interest is appropriate in a case such as this

where reimbursement is sought from an insurer.

This Court does not agree with National's interpretation of the cited case law. Most of the case law cited by National involves reimbursement sought from an insurer by the insured. In such cases a contract breach is easy to discern, a breach of the contract to insure. Here, one insurer is seeking reimbursement from another insurer following a declaration of priority of coverage by the Court, there is no contract between the insurers.

National does cite two cases which it argues award interest in cases where an insurer is seeking reimbursement from another insurer, *Royal Indem. Co. v. Providence Washington Ins. Co.*, 966 F. Supp. 149, 150 (N.D.N.Y. 1997) and *U.S. Fire Ins. Co. v. Fed. Ins. Co.*, 858 F.2d 882, 883 (2d Cir. 1988). In the cases cited by National, the Courts reasoned that there was a breach of an implied contract to co-insure the insured. Privity was implied according to the common sum of which the insurers owed proportional amounts.

In the present case National and Zurich were not found to owe ratable or proportional shares of a common insurance payment, but rather were declared according to an order of priority of coverage. In the present case, there can be no implied privity between the insurers, privity exists only between insurer and insured.

As National has failed to establish an entitlement to interest, this Court need not address whether such interest should be compound or simple or the date from which interest accrues.

Accordingly, it is the decision of this Court that National's Motion pursuant to CPLR Section 3212 seeking certain declarations is denied. Zurich's Cross-Motion pursuant to CPLR Section 3212 seeking certain declarations is granted in part as detailed herein.

Accordingly, it is ORDERED, ADJUDGED and DECLARED that National's Motion seeking certain declarations is denied, and it is further

DECLARED that Zurich does not have to reimburse National for defense costs related to criminal proceedings or governmental investigations, and it is further

DECLARED that Zurich does not have to reimburse National for defense costs that lack sufficient information to determine whether they are related to criminal proceedings or governmental investigations, and it is further

DECLARED that Zurich does not have to reimburse National for the administrative costs related to the audit of legal expenses, and it is further

DECLARED that National is not entitled to interest on reimbursed legal

defense expenses, and it is further

ORDERED that a Judicial Hearing Officer (“JHO”) or Special Referee shall be designated to determine the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

(1) to determine which expenses, that National is seeking reimbursement from Zurich for, are challenged by Zurich as either expenses related to the criminal charges brought against the owners of NY Crane and/or other governmental body investigations/proceedings or expense entries that lacked sufficient information to be analyzed;

(2) to determine, of the expense entries identified as challenged in determination #(1), which expenses National can establish, in accordance with this Order, should be covered under Zurich’s general liability policy;

(3) to determine, of the challenged expenses determined in determination #(2) as covered, which expenses Zurich can establish an exclusion or policy provision to disclaim coverage as to those claims;

and it is further

ORDERED that the powers of the JHO/Special Referee to determine shall not be limited further than as set forth in the CPLR, and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of the Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the “References” link under “Courthouse Procedures”), shall assign this matter to an available JHO/Special Referee to determine as specified above, and it is further

ORDERED that counsel shall immediately consult one another and counsel for Plaintiff National shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at the “References” link on the Court’s website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part, if an appearance is deemed necessary by the Part, and it is further

ORDERED that Plaintiff National shall serve a pre-hearing memorandum within 24 days from the date of this order and Defendant Zurich shall serve objections to the pre-hearing memorandum within 20 days from service of National’s papers and the foregoing papers shall be filed with the Special Referee Clerk at least one day prior to the original appearance date in Part SRP fixed by the

Clerk as set forth above, and it is further

ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR Section 4318) and that the parties shall appear for the reference hearing, including with all such witnesses and evidence as they may seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part, and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion, and it is further

ORDERED that Zurich shall reimburse National for those expenses not challenged as relating to NY Crane's criminal/governmental defense or as lacking sufficient information as well as those challenged expenses that the JHO/Special Referee determines should be covered by Zurich's general liability policy in accordance with the instructions above. Zurich's reimbursement to National shall be in accordance with the policy limits of each insurance policy and the priority of insurance policies declared in Justice Feinman's November 11, 2011 Decision.

ENTER :

Dated: April 22, 2013



 MANUEL J. MENDEZ
 J.S.C. MANUEL J. MENDEZ
 J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE