

Central Park Studios, Inc. v Slosberg

2014 NY Slip Op 30142(U)

January 13, 2014

Supreme Court, New York County

Docket Number: 110490/08

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

CENTRAL PARK STUDIOS, INC. and GERARD J. PICASO, INC.,

INDEX No. 110490/08

Plaintiffs,

MOTION DATE _____

-against-

MOTION SEQ. No. 008

MICHAEL SLOSBERG, et al.,

MOTION CAL No. _____

Defendants.

The following papers, numbered 1 to _____ were read on this motion for _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1-3

Answering Affidavits- Exhibits _____

Replying Affidavits _____

CROSS-MOTION: YES

UNFILED JUDGMENT

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).

Upon the foregoing papers, it is ordered that this motion is: _____

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 1/13/14

Donna M. Mills
J.S.C.

DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

-----X
CENTRAL PARK STUDIOS, INC. and GERARD J.
PICASO, INC.,

Plaintiffs,

-against-

Index No.: 110490/08
Motion Seq. Nos.: 008
DECISION AND ORDER

MICHAEL SLOSBERG, JANET COHN SLOSBERG,
PACIFIC INDEMNITY COMPANY, DSA BUILDERS,
INC., DELOS INSURANCE COMPANY formerly
known as SIRIUS AMERICA INSURANCE
COMPANY, HAGEDORN & COMPANY and STEVE
DWYER,

Defendants.

-----X
DONNA MILLS, J.S.C.:

In a declaratory judgment action, plaintiffs Central Park Studios, Inc. (CPS), Gerard J. Picaso, Inc. (Picaso), and Insurance Company of Greater New York (Greater New York) move, pursuant to CPLR 3212, for summary judgment declaring that an insurance policy issued by Greater New York provides coverage to plaintiffs that is excess to two policies issued by defendant Delos Insurance Company, formerly known as Sirius America Insurance Company (Delos), for an action in this county captioned *Dwyer v Central Park Studios*, index No. 115086/06 (the underlying action). Moreover, Greater New York seeks an order declaring that it is entitled to attorneys' fees and a reference to determine attorneys' fees under CPLR 4317. Meanwhile, Delos cross-moves for summary judgment declaring that the Greater New York's policy provides coverage before Delos's second policy.

Background

The underlying action arose from an incident, on October 7, 2005, in which Steve Dwyer

(Dwyer), a carpenter, fell from a ladder while working at a cooperative building located at 15 West 67th Street in Manhattan. At the time, Dwyer was working for defendant DSA Builders, Inc. (DSA Builders), CPS was the cooperative board, and Picaso was the building's managing agent. Defendants Michael Slosberg and Janet Cohn Slosberg (the Slosbergs) owned the individual unit where Dwyer was injured, and had hired DSA Builders for a renovation project that would, among other things, convert two units into one.

On August 1, 2008, CPS and Picaso filed a summons and complaint in this declaratory judgment action. The subject of this motion is priority of coverage as between three insurance policies, two issued by Delos, and one issued by Greater New York.

Greater New York issued a commercial liability policy, under policy No. 6131MO9472, to CPS and Picaso for the period between April 7, 2005 and April 7, 2006. The policy has a \$1 million per occurrence limit. The first Delos policy, a commercial general liability policy issued to DSA Builders under policy No. IRS107326, covered the period between April 10, 2005 and April 10, 2006 and has a \$1 million per occurrence policy limit. The second Delos policy, a commercial excess liability policy issued to DSA Builders under policy No. IXS201095, covered the same time period and has a \$3 million limit per occurrence.

In a decision issued on June 5, 2012, Judge Feinman held, among other things, that CPS and Picaso are additional insureds under both Delos policies. However, Judge Feinman declined to determine the order of priority, as Greater New York, which has subsequently been added by stipulation, was not yet a party to the action.

All parties agree that Delos's first policy is primary to both its own second policy and Greater New York's policy. As to the latter two policies, Greater New York argues that Delos's

second policy is excess to its policy, while Delos argues that Greater New York's policy is excess to its second policy. In the event that the court finds that these two policies should provide coextensive coverage, the parties disagree as to the proper method of sharing, with Greater New York arguing that contribution by limits would be the appropriate method, while Delos argues for the equal shares method.

Discussion

I. Priority of Coverage

"In order to determine the priority of coverage among different policies, a court must review and consider all of the relevant policies at issue" (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 716 [2007] [internal citation omitted]).

Greater New York issued a commercial general liability policy to CPS and Picasso under policy Number IRS107326. Under the conditions section, the policy sets forth its relation to "Other insurance":

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

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) Any of the other insurance, whether primary, excess, contingent or on any other basis:

- a. That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";
- b. That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;
- c. That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises

rented to you or temporarily occupied by you with permission of the owner; or

d. If the loss arises out of the maintenance or use of aircraft, 'autos,' or watercraft to the extent not subject to Exclusion g. of Section I – Coverage A – Bodily Injury And Property Damage Liability.

(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

(Greater New York policy, Section IV [4]).

Greater New York argues that subsection (b) (2) of its "Other insurance" provision is applicable, as Delos's second policy, like its first, is primary insurance. The first Delos policy has an identical "Other insurance" provision. The parties agree that the first Delos policy is primary to the Greater New York policy because subsection (b) (2) applies, as CPS and Picasso were made additional insureds to the first Delos policy by the attachment of an endorsement.

Delos's second policy is denominated as a "Commercial Excess Liability Policy." It has a no "Other insurance" provision. Greater New York argues that this policy is also primary to its own policy because of a follow-form clause, which states:

The definitions, terms, conditions, limitations, exclusions, and warranties of the "first Underlying Insurance" policy, in effect at the inception date of this policy, apply to this coverage unless they are inconsistent with provisions of this policy, or relate to premium, subrogation, an obligation to investigate and defend, the amount or limits of insurance, payment of expenses, cancellation or any renewal agreement.

(Delos's "Commercial Excess Liability Policy", Section I, Coverage).

Greater New York argues that, as the second Delos policy follows the form of the first Delos policy, and as the first Delos policy is primary to the Greater New York policy, then, as a logical consequence, the second Delos policy is also primary to the Greater New York policy. In

support of this argument, Greater New York cites to *Metropolitan Transp. Auth. v Zurich Am. Ins. Co.*, 68 AD3d 610 [1st Dept 2009]). *Zurich Am.* held that a limitation of the amount of coverage was imported from an underlying policy to an umbrella policy through a follow-form clause:

Defendant excess insurer issued a follow-form policy, which incorporated the terms and conditions of an underlying \$1 million general liability insurance policy to the extent not contradicted by the excess policy's express terms. Here, the underlying policy provided that additional insureds, such as plaintiffs, would be covered up to the lesser of the policy limits or the amount required by their trade contracts with the insured. There is no doubt that plaintiffs were additional insureds. Nor was there any conflict between the excess policy terms and the blanket additional insured rider in the underlying policy. As such, the trade contract limitation was incorporated into the excess policy.

(*id.* at 610-611 [internal citations omitted]).

Greater New York also argues that Delos's failure to indicate the amount of premium DSA Builders paid for the second Delos policy makes a comparison with its own policy impossible.

Delos, in opposition and in support of its cross motion, argues that Greater New York's policy, as a true primary policy, should apply before its own second policy, a true excess policy. Despite this position, Delos notes that both policies are excess to the first Delos policy, and note, citing to *Lumbermens Mut. Cas. Co. v Allstate Ins. Co.* (51 NY2d 651 [1980]), that, generally, where two policies each state that they are excess, the excess clauses cancel each other out and the policies apply together as co-insurance. *Lumbermens* held that "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 out each other and each insurer contributes in proportion to its limit amount of insurance" (51 NY2d at 655 [internal citation omitted]).

Switching tack slightly, Delos argues, citing to *State Farm Fire & Cas. Co. v LiMauro*, 65 NY2d 369 [1985]), that where competing liability policies are irreconcilable, New York applies a functional analysis. *LiMauro*, which involved coverage issues arising from a car accident, held that:

“an insurance policy which purports to be excess coverage but contemplates contribution with other excess policies or does not by the language used negate that possibility must contribute ratably with a similar policy, but must be exhausted before a policy which expressly negates contribution with other carriers, or otherwise manifests that it is intended to be excess over other excess policies”

(*id.* at 375-76 [internal citations omitted]).

Delos also cites to *Jefferson Ins. Co. of N.Y. v Travelers Indem. Co.* (92 NY2d 363 [1998]), as well as, among others, *Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.* (53 AD3d 140 [1st Dept 2008]). *Jefferson Ins.*, which, like *LiMauro*, involved coverage issues arising from an automobile, held that:

New York applies a functional analysis to separate lines of insurance, and an insurance policy should be read in light of the role it is to play. We seek the purpose of the insurance policy, in part, by reference to the commonsense meaning of the terms that describe the policy's coverage vis-a-vis other insurance. Where such terms in two or more policies conflict--as two policies that purport to be excess over each other--insurers must contribute in the proportion their policies bear to the limit of coverage at that level. However, a policy that explicitly provides that it is to be excess over other excess coverage can be specifically enforced by the court

(*id.* at 372 [internal quotation marks and citation omitted]).

Bovis Lend Lease, which involved coverage questions stemming from a worker's death in an elevator shaft, held that “an umbrella or excess liability insurance policy should be treated as just that, and not as a second layer of primary coverage, unless the policy's own terms plainly provide for a different result” (53 AD3d at 141). The Court reasoned that “[t]o hold otherwise

would ... merely sow uncertainty in the insurance market” (*id.*).

Delos argues that the Greater New York policy has all of the indicia of a primary policy, such as a duty to defend and a statement that umbrella coverage was also available, while Delos’s second policy has all the indicia of an excess policy. For example, it disclaims the duty to defend and specifically states that it is excess insurance and “shall apply (a) only in excess of all Underlying Insurance, and (b) only after all Underlying Insurance has been exhausted by payment of the limits of such insurance” (Delos Second Policy, § 1, Coverage). Moreover, Delos argues that the functional approach is appropriate here because Greater New York’s policy is silent as to its priority relating to excess, or umbrella policies.

Finally, Delos argues that Greater New York’s position is not supported by case law or logic. As to *Zurich Am.* (68 AD3d 610), Delos argues that it is inapplicable as nothing in it suggests that a follow-form provision can transform an excess policy into a primary policy. Logically, Delos argues that the second policy’s clear statements that it is excess to the first policy provides an inconsistency with the “Other insurance” provision that makes the first policy primary. Thus, Delos argues, the second Delos policy does not follow the form of the first Delos policy with respect to primacy.

In reply, Greater New York argues that a functional analysis is only appropriate to different lines of coverage, meaning different policy types, such as a conflict involving an automobile policy and a workers compensation policy, rather than policies in the same line of coverage, such as the two liability policies at issue here. Delos, in its reply, notes that two different lines of coverage are at issue since Greater New York’s policy is a commercial general liability policy, while its own second policy is a commercial excess liability policy. In any event,

Delos notes that the case law makes clear that the functional approach is used across different levels of the same kind of insurance, as in cases where courts have determined priority between primary and umbrella policies of various automobile insurance policies.

Here, the analysis is more straightforward than the parties arguments would suggest. Both the Greater New York policy, and the second Delos policy are excess to the First Delos policy. The follow-form provision in the second Delos policy does not convert that excess policy into a primary policy (*see Bovis Lend Lease* [53 AD3d at 141] [“an umbrella or excess liability insurance policy should be treated as just that, and not as a second layer of primary coverage, unless the policy’s own terms plainly provide for a different result”]). The follow-form provision in the second Delos policy only applies where there is no inconsistency between the two policies, and there is clearly an inconsistency as to their priority, as one is a primary policy and the other is excess.

The Greater New York policy has, through application of section (b) (2) of its other-insurance provision, the same relation, that of an excess policy, to the primary Delos policy as the second Delos policy. While the Greater New York policy has an other-insurance provision, it does not address priority of coverage in the instance that it is excess coverage but there is another excess policy. A functional analysis is not needed here because there is no conflict as to priority: both policies are silent as to their priority relative to another excess policy. According to that silence, neither policy has priority over the other and, as the policies afford co-insurance, the next question is how they will share the obligation to contribute should the first Delos policy be exhausted.

II. Method of Sharing

The Greater New York policy provides that:

If all the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

(Greater New York Policy, § IV [c]).

Greater New York argues that since the Delos excess policy is silent as to method of sharing, it does not permit contribution. Delos argues that the silence of its policy indicates a lack of objection, rather than a prohibition, and, as such, the Greater New York's policy requires contribution by equal shares.

In support of its position, Delos contends that no New York cases address the question of whether silence should be equated with permission or a lack of permission in this context, but offers a Massachusetts case, *Mission Ins. Co. v U.S. Fire Ins. Co.* (401 Mass 492 [1987]), holding that, in the absence of sharing provisions in the governing policies, "the better approach is to require the insurers to contribute equally until the policy with the lower limit is exhausted" (*id.* at 500).

Here, as the Delos excess policy does not prohibit contribution by equal shares, it permits such a method of sharing. As a result, the Greater New York policy dictates that contribution by equal shares is the proper method of sharing.

II. Attorneys' Fees

Delos has not opposed the branch of plaintiffs' motion that seeks attorneys' fees in the

underlying action from the date of tender to Delos until Delos assumed the defense of CPS and Picasso. As it is undisputed that Delos owed CPS and Picasso a defense under its first policy, Greater New York is entitled to recoup the attorneys' fees it has expended defending CPS and Picasso in the underlying matter.

Conclusion

Accordingly, it is

ORDERED that the branch of plaintiffs' motion for declaratory relief and defendant Delos Insurance Company's cross motion for declaratory relief are each denied to the extent that the parties are not entitled to the order of coverage they seek; and it is

ADJUDGED and DECLARED that defendant Delos Insurance Company policy No. IRS107326 provides primary coverage to plaintiffs Central Park Studios, Inc. and Gerard J. Picaso, Inc. in the underlying action in this county captioned *Dwyer v Central Park Studios*, index No. 115086/06; defendant Delos Insurance Company's policy No. IXS201095 and plaintiff Insurance Company of Greater New York's policy No. 6131MO9472 are each excess to the primary policy and are to use, as the method of sharing, contribution by equal shares; and it is further

ORDERED that the portion of the plaintiffs' action that seeks the recovery of attorneys' fees is severed and the issue of the amount of reasonable attorneys' fees plaintiff Insurance Company of Greater New York's may recover against defendant Delos Insurance Company, Inc. is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the plaintiffs shall, within 30 days from the date of this order,

serve a copy of this order with notice of entry, together with a completed Information Sheet,¹ upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

Dated:

9/13/14

ENTER:


Hon. DONNA MILLS, J.S.C.

DONNA M. MILLS, J.S.C.

UNFILED JUDGMENT

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).

¹ Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh under the "References" section of the "Courthouse Procedures" link).