

Central Park Studios, Inc. v Federal Ins. Co.
2014 NY Slip Op 31608(U)
April 22, 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 PART 58
Justice

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

INDEX NO. 110490/08

Plaintiffs,

MOTION DATE _____

-v-

MOTION SEQ. NO. 09

MICHAEL SLOSBERG, et al.,

FILED

Defendants. APR 24 2014

MOTION CAL NO. _____

NEW YORK COUNTY CLERKS OFFICE

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1, 2, 3

Answering Affidavits- Exhibits 4

Replying Affidavits _____

CROSS-MOTION: YES NO

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

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: April 22, 2014

Donna M. Mills
DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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,

-and-

FEDERAL INSURANCE COMPANY

-against-

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.:

Index No.: 110490/08
Motion Seq. Nos.: 009
DECISION AND ORDER

FILED

APR 24 2014

NEW YORK
COUNTY CLERK'S OFFICE

In a declaratory judgment action, plaintiff-intervenor Federal Insurance Company (Federal) moves, pursuant to CPLR 3212, for summary judgment declaring that it provides excess insurance in an underlying matter to plaintiffs Central Park Studios, Inc. and (CPS) and Gerard J. Picaso, Inc. (Picaso), and that the other applicable policies must be fully exhausted before Federal's obligation to pay is triggered. Defendant Delos Insurance Company, formerly known as Sirius America Insurance Company (Delos), cross-moves for summary judgment declaring that its excess policy affords coinsurance with the Federal excess policy.

Background

The underlying action, captioned *Dwyer v Central Park Studios*, index No. 115086/06, 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.

By decision and order dated January 13, 2013, the court declared that Delos's policy No. IRS1077326 provides primary coverage to CPS and Picasso in the underlying action, and that two additional policies, one issued by plaintiff Insurance Company of Greater New York (Greater New York) under policy No. 6131MO9472, and another issued by Delos under policy No. IXS201095, are each excess to Delos's primary policy. Moreover, the court declared that the Delos excess policy and the Greater New York excess policy are to use contribution by equal shares as a method of sharing in the event that the primary policy is exhausted.

Discussion

“Summary judgment must be granted if the proponent makes ‘a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,’ and the opponent fails to rebut that showing” (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, “‘regardless of the sufficiency of the opposing papers’” (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

“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]).

Federal issued an excess policy, under policy No. 79538904 to CPS, effective from

January 1, 2005 through January 1, 2007 with a limit of \$25,000,000. The Federal excess policy's "other insurance" provisions states:

"If other valid and collectable insurance is available to the insured for loss we would otherwise cover under this insurance, our obligations are limited as follows. This insurance is excess over any other insurance, whether primary, excess, contingent or on any other basis. We will have no duty to defend the insured against any suit if any provider of any other insurance has a duty to defend such insured against such a suit. We will pay only our share of the amount of loss, if any, that exceeds the sum of the total:
- amount that all other insurance would pay for loss in the absence of this insurance; and
- of all deductible and self-insurance amounts under all other insurance.
This is not subject to the terms or conditions of any other insurance."

Federal cites to *State Farm Fire & Cas. Co. v LiMauro*, 65 NY2d 369 [1985]), which 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 argues that the court should, using a functional approach determine that its own excess policy and Federal's excess policy are coinsurance, and that they should share payments by equal shares.

Delos cites, among others, to *Jefferson Ins. Co. of N.Y. v Travelers Indem. Co.* (92 NY2d 363 [1998]), which 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.

[5]

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]).

Here, *Jefferson Ins. Co. of N.Y.*, Delos’s case, directly supports Federal’s position and shows why Federal is entitled to judgment. Importantly, there is no conflict between the policies. Federal’s policy is explicitly excess over the other excess policies, and Delos’s policy is not. Greater New York’s excess policy also lacks such a provision. Since there is no conflict, there is no need to use a functional approach. As Federal’s policy is explicitly excess to all other policies, Federal is entitled to the declaratory relief it seeks, and Delos’s cross motion must be denied.

Conclusion

Accordingly, it is

ORDERED that the plaintiff-intervenor Federal Insurance Company’s motion for declaratory relief is granted; and it is

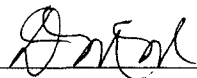
ADJUDGED and DECLARED that plaintiff-intervenor Federal Insurance Company’s policy No. 79538904 provides coverage to plaintiffs Central Park Studios, Inc. and Gerard J. Picasso, Inc. in the underlying action in this county captioned *Dwyer v Central Park Studios*, index No. 115086/06 on a basis excess to all other applicable policies, including defendant Delos Insurance Company’s policy No. IRS107326 and policy No. IXS201095, as well as plaintiff Insurance Company of Greater New York’s policy No. 6131MO9472. The other policies must

be exhausted before Federal Insurance Company's obligation to pay is triggered; and it is further

ORDERED that defendant Delos Insurance Company's cross motion for summary judgment declaring its own excess policy coinsurance with plaintiff-intervenor Federal Insurance Company's excess policy is denied.

Dated: 4/22/14

ENTER:



Hon. DONNA MILLS, J.S.C.

DONNA H. MILLS, J.S.C.

FILED
APR 24 2014
NEW YORK
COUNTY CLERK'S OFFICE