Valley Forge Ins. Co. v Allstate Indem. Co.
2014 NY Slip Op 31968(U)
July 25, 2014
Sup Ct, Kings County
Docket Number: 504449/2013
Judge: David I. Schmidt

At an IAS Term, Part Comm 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 9th day of July, 2014.

PRESENT:

HON. DAVID I. SCHMIDT,
Justice.

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VALLEY FORGE INSURANCE COMPANY FOR ITSELF AND AS SUBROGEE OF GRANITE CONSTRUCTION INC.,

Plaintiff,

- against -

Index No. 504449/13

ALLSTATE INDEMNITY COMPANY,

Defendant.

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The following papers numbered 1 to 10 read on the motions herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3-4
Opposing Affidavits (Affirmations)	5
Reply Affidavits (Affirmations)	6, 7, 8, 9, 10
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiff Valley Forge Insurance Company (VFI) moves for summary judgment declaring that defendant Allstate Indemnity Company (Allstate) is an insurer for Granite Construction Inc. (Granite) with respect to an underlying lawsuit and is obligated to defend and indemnify Granite on a primary basis in that action, and to reimburse

all costs, fees and expenses incurred by VFI in defending Granite. Allstate cross-moves for summary judgment dismissing VFI's complaint.

The Accident and Underlying Wrongful Death Action

The instant insurance coverage action arises out of a June 25, 2010 construction-related accident in which non-party Richard Lang sustained fatal injuries. Prior to the accident, Granite was hired as the general contractor on a project involving the rehabilitation of several train stations on the Brighton Line of the New York City Subway system, including the Avenue M Station in the Midwood section of Brooklyn. Granite, in turn, subcontracted non-party RISA Management (RISA) to manufacture and install certain wall panels in the stations undergoing renovation. These were made of ceramic and steel, measured 19' x 8' and weighed approximately 1,200 pounds each. Once the panels were fabricated, RISA retained a trucking company, non-party Preferred Transportation/Brinker Enterprises (Preferred),[1] to transport the panels from RISA's factory on Long Island to the job site in Brooklyn. On the day prior to the accident, Mr. Lang, who was employed by Preferred, drove a flatbed truck owned by Brinker and leased by Preferred to RISA's factory where 11 panels were loaded onto the truck by RISA employees using a forklift. The panels were stacked vertically on the flatbed and secured using nylon straps.[2] In addition, to help

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[1]Brinker and Preferred were related entities that were both owned by Robert Vilasi.

[2]The panels were not laid flat on the truck inasmuch as they would have extended over the sides of the truck, making it unsafe for traffic.

support the load, certain metal posts/stakes (i.e., channel iron bracing), which were fabricated by RISA, were placed in a rail that ran along the sides of the truck at 24" intervals.

On the day of the accident, Mr. Lang drove the truck to Brooklyn and parked on the street near the Avenue M subway station, where the panels were to be unloaded by RISA employees as well as a Granite employee operating a forklift. The accident occurred when Mr. Lang loosened the nylon straps securing the panels while standing on the curb beside the truck. In particular, after the strap was loosened, the panels toppled over, bent the metal posts which had been installed along the sides of the truck, and fell off both sides of the truck. Two of these panels fell on top of Mr. Lang, causing the aforementioned fatal injuries. After the accident, an investigation was conducted and a report was prepared by the Occupational Safety and Health Administration (OSHA). This report stated that: "[t]he cause of the accident appears to be insufficient support of the load on the truck (insufficiently strong channel iron bracing). The panels were standing up on the truck bed which requires much more support (such as a rack) th[a]n if they were laid flat on the truck."

On June 18, 2012, Mr. Lang's wife, Constance Schallip, commenced a wrongful death action against Granite and RISA in the United States District Court for the Eastern District of New York by filing a complaint alleging, among other things, that their negligence caused Mr. Lang's death. Subsequently, an amended complaint was filed which contained an additional cause of action alleging violations of "section 240 and/or section 241" of the

Labor Law.[3] On September 4, 2013, the parties in the underlying action entered into a so-ordered stipulation transferring the matter to New Jersey State Court with the proviso that all claims against Granit and RISA "shall be governed by New York law.[4]

The Subcontract Agreement and Relevant Insurance Policies

Under the terms of the subcontract agreement between RISA and Granite, RISA was required to procure certain insurance coverage including "Comprehensive Automobile Liability Insurance." In addition, the subcontract required that Granite be named "as an additional insured on [RISA's] . . . automobile liability insurance policy." Finally, the subcontract stated that "any other insurance maintained by . . . [Granite] shall be in excess only and shall not be called upon to contribute with the insurance of [RISA]." Similarly, an attachment to the subcontract provided that "[t]he additional insured endorsement required [under the subcontract] shall be written . . . without modification or change from the standard ISO form language . . . including that this insurance shall serve as primary without qualification."

At the time of the underlying accident, RISA was the named insured under a business automobile liability policy issued by Allstate. Under the coverage terms of the policy, Allstate agreed to "pay all sums an 'insured' legally must pay as damages because of 'bodily

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[3]Presumably, the amended complaint refers to Labor Law §§ 240 (1) and 241 (6).

[4]Preferred and Brinker are listed as party defendants in the caption of the New Jersey action. The so-ordered stipulation provides that all claims and cross claims against them "shall be governed by New Jersey law."

injury' . . . to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto.'" The policy also contained an endorsement which, in addition to the named insured, included as an "insured" for liability:

> "Any person or organization that you are required to name as an additional insured under the terms of a written job contract, or by written insurance requirements executed prior to any covered 'loss' or claim. This protection applies only if the person or organization is liable for the conduct of an 'insured' and only to the extent of that liability."

With respect to the issue of vehicle coverage, the policy listed and described various autos that were covered including "hired" autos, which were described as "those 'autos' you lease, hire, rent or borrow."

At the time of the accident, RISA was also insured under a General Liability insurance policy issued by National Casualty Company (National). However, National has refused to defend or indemnify RISA in the underlying action based upon the fact that RISA was covered under an Owner Controlled Insurance Program or "wrap-up" policy issued by Liberty Mutual that was in effect at the time of the accident. In this regard, the National policy excluded coverage for bodily injuries occurring at job sites covered by the wrap-up policy. However, in a letter dated November 23, 2010, Liberty Mutual disclaimed any coverage to RISA under the wrap-up policy inasmuch as the policy excluded coverage for "'Bodily injury' . . . arising out of the ownership, maintenance, use or entrustment to others of any 'auto' owned or operated by or rented or loaned to any insured. Use includes operation and 'loading or unloading.'"

With respect to Granite, in addition to being covered as an additional insured under the Allstate policy pursuant to the terms of the subcontract and policy itself, Granite was also covered by a General Liability policy issued by VFI. However, like the Liberty Mutual policy, the VFI policy contained an exclusion for injuries arising out of the use of an auto. In addition, the VFI liability policy provided that it would be excess to any other insurance "if the loss arises out of the . . . use of . . . 'autos' . . . not subject [to the auto exclusion]."

Procedural History

After the commencement of the underlying action, Allstate took on RISA's defense in the action while VFI defended Granite. Thereafter, in a series of correspondences beginning in August of 2012, VFI requested that Allstate defend and indemnify Granite as an additional insured under the Allstate auto policy. Ultimately, in a letter dated June 28, 2013, Allstate denied Granite's request for defense and indemnification in the underlying suit. In particular, Allstate claimed that the truck involved in the underlying accident was not a covered auto under the policy. In addition, Allstate maintained that "[G]ranite is not being held liable for the conduct of [RISA]. Consequently, there is no coverage under the Allstate policy for [Granite]." Finally, Allstate disclaimed coverage based upon Granites' purported failure to provide timely notice of the accident and the underlying lawsuit.

By summons and complaint dated August 2, 2013, VFI brought the instant declaratory judgment action against Allstate seeking a judgment declaring that Allstate is required to defend and indemnify Granite in the underlying action and that Allstate is further required

to reimburse VFI for all costs it has incurred in defending Granite in the underlying action. On September 9, 2013, Allstate filed an answer to the complaint. On September 17, 2013, VFI filed the instant motion for summary judgment. On November 7, 2013, Allstate filed the instant cross motion for summary judgment as well as opposition papers to VFI's summary judgment motion. On December 4, 2013, VFI filed a reply affirmation to Allstate's opposition papers and in further support VFI's summary judgment motion. On January 21, 2014, Allstate filed a reply affirmation to VFI's opposition papers and in further support of Allstate's cross motion. On January 28, 2014, VFI filed a sur-reply in further support of its summary judgment motion and in further opposition to Allstate's cross motion.

On or about March 10, 2014, Allstate commenced a declaratory judgment action against National, Liberty Mutual, RISA, and Constance Schallip by filing a summons and complaint in this court.[5] Among other things, the complaint seeks a judgment declaring that National and/or Liberty Mutual is obligated to defend and indemnify RISA in the underlying action. The complaint also seeks a judgment declaring that Allstate is not obligated to defend and indemnify RISA inasmuch as the truck involved in the accident was not a covered auto under Allstate's policy. On March 11, 2014, Allstate filed a sur-sur reply in the instant action in which it noted that it had commenced the aforementioned declaratory judgment action and argued that VFI's motion for summary judgment must be denied inasmuch as Liberty Mutual

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[5]Allstate has filed a motion to consolidate its action with the instant action. However, RISA has filed for bankruptcy in Federal Court. Thus, all matters involving RISA are presently stayed.

and National are necessary parties to the action. On March 14, 2014, VFI filed an affirmation in response to Allstate's sur-sur reply. The motion and cross motion for summary judgment are now fully submitted and before the court.

Arguments

In moving for summary judgment in its declaratory judgment action against Allstate, VFI maintains that Granite is clearly covered under the Allstate policy with respect to the underlying accident. In particular, VFI points to the undisputed fact that under the terms of the subcontract agreement, RISA was required to list Granite as an additional insured under its automobile liability insurance policy. VFI further notes that the Allstate policy specifically includes as an insured "any person or organization that you are required to name as an additional insured under the terms of a written job contract." Thus, VFI maintains that Granite is an insured under the policy. VFI also argues that truck involved in the accident is a "covered auto" under the terms of the policy inasmuch as the policy specifically covers vehicled which RISA "hires." According to VFI, RISA clearly hired the subject vehicle inasmuch as it contracted Preferred to provide the truck as well as a driver in order to transport the panels to the job site. VFI also notes that Allstate has defended RISA in the underlying lawsuit. Thus, VFI maintains that Allstate has effectively conceded that the truck is a covered vehicle and that it is inconsistent for Allstate to defend RISA in the underlying action while refusing to defend Granite.

With respect to the issue Granite's coverage under the VFI general liability policy, VFI maintains that, although it has agreed to defend Granite in the underlying action, there is no coverage inasmuch as the VFI policy has an exclusion for bodily injuries that arise out of the use of a motor vehicle. In any event, to the extent that this exclusion does not apply, VFI argues that its coverage would only be excess to Allstate's primary coverage. In this regard, VFI points to the "other insurance" provisions of its policy, which provides that the policy is excess to any other insurance if the loss arises out of the use of an automobile not subject to the auto exclusion in the policy. Under the circumstances, VFI maintains that Allstate is obligated to defend and indemnify Granite in the underlying lawsuit on a primary basis.

In opposition to VFI's motion, and in support of its own cross motion for summary judgment dismissing the complaint, Allstate argues that the truck involved in the underlying accident is not a covered auto under the terms of its policy, and therefore, Allstate has no duty to defendant and indemnify Granite inasmuch as the policy does not cover the accident. In particular, Allstate argues that the subject truck does not qualify as a "hired auto" under the terms of the policy. In support of this contention, Allstate notes that RISA merely hired an independent contractor/trucking company (Preferred) to transport the panels to the job site. Allstate further notes that the truck itself was owned and/or leased by Preferred and that the truck driver (i.e., Mr. Lang), was a full time employee of Brinker. According to Allstate, under these circumstances, relevant case law holds that the truck used by the trucking

company does not qualify as a "hired" vehicle so as to trigger coverage under the policy it issued to RISA (*see Federal Ins. Co. v Ryder Truck Rental*, 189 AD2d 582 [1993]).

Allstate also argues that Granite is not covered under its policy based upon the language in the additional insured endorsement in the policy. Specifically, Allstate notes that this provision states that "[t]his protection applies only if the person or organization is liable for the conduct of an 'insured' and only to the extent of that liability." According to Allstate, the underlying action does not seek to hold Granite liable for RISA's conduct. Thus, Allstate maintains that Granite cannot be considered an additional insured for purposes of coverage for the underlying claims.

In addition, Allstate maintains that even if the truck is covered under its policy, such coverage is excess to Granite's coverage under the VFI policy. In particular, Allstate notes that the "other insurance" provision of its policy clearly states that "for any covered 'auto' you don't own, the insurance provided by this Coverage Form is excess over any 'collectible' insurance." Here, it is undisputed that RISA did not own the truck involved in the accident. As a final matter, as previously noted, in its March 11, 2014 sur-sur reply, Allstate raised the argument that VFI's motion for summary judgment must be denied inasmuch as it failed to name Liberty Mutual and National, which are necessary parties in this action.

In opposition/reply to Allstate's cross motion and opposition papers, VFI maintains that there is no merit to Allstate's claim that the truck was not a "hired" vehicle under the Allstate policy. In particular, VFI maintains that the instant case is distinguishable from the

Federal Ins. Co. case inasmuch as RISA directly hired Preferred to transport the panels. In addition, VFI points to evidence in the underlying case which indicates that RISA selected the specific flatbed truck which would be used to transport the panels and also modified the truck by fabricating and installing metal posts on the truck to help support the panels. At the very least, VFI maintains that Allstate must defend Granite in the underlying suit since there are issues of fact as to whether the truck was a covered vehicle. In this regard, VFI points to the well-settled principle of law that an insurer's duty to defend is greater than its duty to indemnify.

With respect to Allstate's argument that its policy provides excess coverage to the coverage provided by the VFI policy, VFI avers that its policy does not provide coverage since it contained an exclusion for autos. In any event, VFI contends that the "other insurance" provisions of the Allstate policy only apply to RISA, and are silent as to all other parties, including Granite. Thus, VFI maintains that its policy is excess to Allstate's policy.

VFI also argues that there is no merit to Allstate's argument that Granite is not an additional insured since the underlying action does not seek to hold Granite liable for RISA's conduct. In this regard, VFI notes that Granite was a general contractor on the job and the underlying complaint seeks to hold Granite vicariously liable for the acts of its subcontractor RISA pursuant to Labor Law § 240 (1). Finally, VFI contends that the court should reject Allstate's sur sur reply inasmuch as it never received permission from the court to file these papers. In addition, VFI notes that Allstate has filed its own summary judgment cross motion

in this matter. Thus, VFI maintains that Allstate is estopped from claiming that VFI's summary judgment motion must be denied because necessary parties have not been joined in this action. In any event, VFI avers that Liberty Mutual and National are not necessary parties in this action since they will not be inequitably affected by a ruling that Granite is or is not owned coverage or a defense in the underlying action by Allstate.

Findings and Rulings

As an initial matter, Allstate's claim that Granite is not an additional insured for purposes of the underlying action inasmuch as the underlying action does not seek to hold Granite liable for RISA's conduct is clearly without merit. In particular, it is true that the underlying complaint and amended complaint assert direct negligence claims against Granite. Thus, to the extent Granite is found liable for its own negligence in the underlying action, the Allstate policy would not provide coverage. However, the amended complaint also asserts claims against Granite under Labor Law § 240 (1) and § 241 (6). Thus, the amended complaint seeks to hold the general contractor Granite liable for the actions and non-actions of its subcontractor RISA. In this regard, Allstate's claim that "Labor Law 240 does not make an entity vicariously liable for the conduct of another" is baseless. In fact, general contractors such as Granite are routinely held vicariously liable for the actions and non-actions of subcontractors under both Labor Law § 240 (1) and § 241 (6) (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]; *Nostrom v A.W. Chesterton Co.*, 15 NY3d 502, 506

[2010]). Under the circumstances, the additional insured endorsement in the Allstate policy is clearly applicable.

Also without merit is Allstate's argument that RISA's motion for summary judgment must be denied and/or deferred for failure to join Liberty Mutual and National as party defendants in this action. In this regard, Allstate improperly raised this argument for the first time in an unauthorized sur sur reply affirmation (*Garced v Clinton Arms Assoc.*, 58 AD3d 506, 509 [2009]; *Graffeo v Paciello*, 46 AD3d 613, 615 [2007]). Further, Allstate's argument is inconsistent with the procedural course that Allstate itself has charted. In particular, Allstate itself has cross-moved for summary judgment in this action. In any event, any declaration by this court regarding the coverage obligations as between VFI and Allstate will not inequitably affect the rights of Liberty Mutual or National.

The main issue in this case concerns the question of whether or not the truck that was being unloaded at the time of the accident is a covered auto under the Allstate policy. This issue, in turn, revolves around the question of whether or not the truck is a "hired" auto under the policy. Although the "hired auto" clause is a standard provision in business automobile liability policies, there are surprisingly few reported New York cases that deal with the issue of when a vehicle is considered a "hired auto" so as to trigger insurance coverage under a business auto policy. In fact, to this court's knowledge, the only New York case which directly deals with this issue is the First Department's ruling in *Federal Ins. Co.*, upon which Allstate places great reliance. In *Federal Ins. Co.*, a movie production company (Mirage)

hired a trucking company (Erie) to transport certain theatrical equipment. The trucking company leased a truck owned by Ryder to transport the equipment. At the time, Mirage was covered under a business auto policy issued by Federal. This policy contained an endorsement stating "hired autos specified as covered autos you own." Based upon this endorsement, Erie argued that the Federal policy provided primary coverage for the Ryder truck inasmuch as Mirage "hired" the truck. However, the Appellate Division, First Department rejected this argument. In particular, the First Department ruled:

> "Where Mirage did not rent the truck from Ryder and paid no compensation to it for the use of the vehicle, but rather paid Erie, an independent contractor, for theatrical trucking services, it is clear that Erie was making a profit by providing both the truck and driver and was not in the truck rental business. Under these circumstances, the Ryder truck was not a vehicle 'hired' by Mirage."

To some extent, *Federal Ins. Co.* is distinguishable from the facts in the instant case inasmuch as here, the insured (RISA) directly retained and paid the vehicle owner (Preferred) to truck the panels to the job site. However, in other respects, *Federal Ins. Co.* is on point with this case. Specifically, Preferred, like Erie, was not in the truck rental business but instead, was a trucking services company that was making a profit by providing a truck and driver to transport the panels for RISA. Moreover, in reviewing how the "hired auto" clause has been interpreted in other jurisdictions, it seems clear that the mere fact that RISA hired the independent contractor/truck owner Preferred to transport the panels is insufficient to establish that the truck used by Preferred is covered as a "hired auto" under RISA's policy

with Allstate. Stated otherwise, standing alone, an insured's hiring of a truck owner who provides a truck and driver to transport materials is not equivalent to "hiring" the vehicle itself so as to trigger coverage under a "hired auto" clause of the insured's auto policy.

Instead, as a general rule, in order for a vehicle to be considered a "hired auto," there must be either a contract between the insured and the truck owner whereby the insured specifically leases or rents the vehicle itself or, absent such an agreement, there must be evidence that the insured exerted dominion or control over the vehicle, or at least had the authority to exert such control (*see e.g., Troops v Gulf Coast Marine Inc.*, 72 F3d 483 [5th Cir 1996]; *Sprow v Hartford Ins. Co.*, 594 F2d 418, 422 [5th Cir 1979]; *Jeffries v Jack Ahrold Agency, Inc.*, 821 NW2d 286 [Iowa App. 2012]; *Holmes v Brethren Mut. Ins. Co.*, 868 A.2d 155 [D.C. Ct. App. 2005]). In this regard, "[t]he key inquiry regarding whether an automobile will fall within the hired automobile provision of a policy is whether the insured exercised dominion, control or the right to direct the use of the vehicle" (Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 118.46 [3d ed. 1997]). In determining whether the insured exercised such control, courts may consider a number of factors, including whether or not the insured maintained the vehicle, whether the insured selected the vehicle being used, whether the insured selected the individual driver and had the authority to fire the driver, whether the insured was only interested in the results of transporting from point A to point B, and whether the insured assumed control of a truck or driver by directly loading and unloading the vehicle (*Troops*, 73 F3d at 487-488).

Here, there was no rental or lease agreement between RISA and Preferred. However, there is conflicting evidence with regard the degree of control RISA exercised over the truck. In particular, the e-mail exchanges between RISA and Preferred prior to the accident indicate that RISA specifically selected the truck involved in the accident inasmuch as it would be able to accommodate a "rack" to hold the panels. There is also evidence in the form of the post-accident OSHA report which indicates that RISA modified the truck by having its employees fabricate metal posts and affix them to the sides of the flatbed in order to help secure the panels. In addition, it is undisputed that RISA loaded the truck and was (partially) responsible for unloading the truck at the job site. Indeed, this evidence indicates that RISA's interests went beyond merely seeing that the panels were transported from Long Island to the Brooklyn job site. RISA was also concerned with and otherwise played a prominent and direct role in the loading and unloading of the subject vehicle. On the other hand, it is undisputed that RISA played no role in selecting the driver of the truck or what route he took to the job site.[6] Indeed, it does not appear that RISA retained any control over Mr. Lang. Further, RISA did not maintain the truck. In addition, at his deposition in the underlying action, Rishi Prashad, RISA's Chief Operation Officer, testified that Preferred was solely responsible for securing the panels on the flatbed truck. Mr. Prashad also denied that RISA did anything to modify the truck.

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[6]The evidence in the underlying case indicates that Mr. Lang drove the loaded truck back to New Jersey after it was loaded at RISA's factory the day before the accident. On the morning of the accident, Mr. Lang drove the truck from New Jersey to the job site in Brooklyn.

Under the circumstances, there are issues of fact as to whether or not RISA exercised sufficient control over the subject truck so as to trigger coverage under the Allstate auto policy under the "hired auto" endorsement of the policy. However, it is well-settled that "an insurers duty to defend is liberally construed and is broader than the duty to indemnify" (*Natural Organics, Inc. v Onebeacon Amer. Ins. Co.*, 102 AD3d 756, 758 [2013]). In this regard, "an insurer's duty to defend . . . arises whenever the allegations in the complaint in the underlying action, construed liberally, suggest a reasonable possibility of coverage" (*Rhodes v Liberty Mut. Ins. Co.*, 67 AD3d 881, 882 [2009]). Here, given the control that RISA exercised over the truck involved in the accident, there is a reasonable possibility that the truck is covered under the Allstate policy as a hired vehicle. Consequently, Allstate's duty to defend the additional insured Granite in the underlying action was triggered.

As a final matter, the court must examine the priority of coverage as between the Allstate auto policy and Granite's liability policy with VFI in order to determine which of these two insurers has the primary obligation to defend, or whether the defense costs must be shared on a pro rata basis (*see Great N. Ins. Co. v Mount Vernon Fire Ins. Co.*, 92 NY2 682, 686-687 [1999]). In this regard, the court rejects VFI's argument that the auto exclusion provision in its policy precludes coverage for the underlying accident. Specifically, the clause in question excludes coverage for bodily injuries "arising out of the ownership, maintenance, use or entrustment to others of any . . . auto . . . owned or operated by or rented or loaned to any insured. Use includes operation and 'loading and unloading.'" Thus, the

exclusion only applies to autos owned, operated by, rented, or loaned to an insured. Here, the insured Granite did not own, operate, rent or borrow the truck involved in the accident. Accordingly, the exclusion does not apply.

However, it is clear that VFI's coverage is excess under the "other insurance" provisions of the policy. In particular, the policy provides that its coverage is excess over "[a]ny of the other insurance, whether primary, excess, contingent or on any other basis: If the loss arises out of the maintenance or use of [autos] to the extent not subject to the exclusion [in the policy]." Here, the accident arose out of the use of an auto and the aforementioned exclusion does not apply. Thus, the VFI policy is excess.

In contrast, the "other insurance" provision of the Allstate policy is silent as to whether "hired auto" bodily injury coverage is primary or excess. In particular, the Allstate policy states that for any covered auto owned by the name insured (*i.e.* RISA), the policy provides primary coverage and that for any covered auto the named insured does not own, the policy provides excess coverage. However, the "other insurance" provision does not indicate whether a "hired auto" is an owned or a non-owned vehicle for purposes of bodily injury coverage. Rather, the policy merely states that with respect to "Hired Auto *Physical Damage Coverage*, any covered 'auto' you lease, *hire*, rent or borrow is deemed to be a covered 'auto' you own" (emphasis added). Further, the other insurance provision of the Allstate policy does not state whether its coverage is primary or excess with respect to insureds such as Granite who were covered under the additional insured provision of the

policy. Under the circumstances, Allstate has the primary obligation to defend Granite in the underlying action. Moreover, Allstate is obligated to reimburse VFI for the costs it incurred in defending Granite in the underlying action to date (*Sandy Creek Cent. School Dist. v United Nat. Ins. Co.*, 37 AD3d 812, 814 [2007]).

Summary

In summary, VFI's motion for summary judgment declaring that Allstate is required to defend and indemnify Granite in the underlying action is granted to the extent that Allstate is obligated to defend Granite in the underlying action and to reimburse VFI for the costs it has incurred to date in connection with the defense of that action. Allstate's cross motion for summary judgment dismissing the complaint is denied.

This constitutes the decision, order, and judgment of the court.

ENTER,

J. S. C.

HON. DAVID I. SCHMIDT